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Feb. 17. Aff'd. Miller

SUPREME COURT OF THE UNITED STATES.

No. ~~185.~~ 110.

CHARLES H. WALKER, TRACY J. BRONSON, WILLIAM KELLOGG, AND GEORGE C. WALKER, APPELLANTS,

VS.

THE WESTERN TRANSPORTATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

GOVERNMENT PRINTING OFFICE,

Watchman's dep. not in case – McRae.

SUPREME COURT OF THE UNITED STATES.

No. 185.

CHARLES H. WALKER, TRACY J. BRONSON, WILLIAM KELLOGG, AND GEORGE C. WALKER, APPELLANTS,

VS.

THE WESTERN TRANSPORTATION COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 In the circuit court of the United States, northern district of Illinois, set.

Pleas in the circuit court of the United States for the eighth circuit and northern district of Illinois, before the Hon. David Davis, one of the justices of the Supreme Court of the United States of America, and sole judge of said circuit, and on Monday, the twenty-sixth day of October, in the year of our Lord one thousand eight hundred and sixty-three, and of the independence of the United States the eighty-eighth year.

WM. H. BRADLEY, *Cl'k.*

Appeal.

Charles H. Walker, Tracy J. Bronson, William Kellogg, and George C. Walker, and The Chicago Mutual Insurance Co.,
v.
The Western Transportation Company.

2 Be it remembered, that on the second day of August, in the year of our Lord one thousand eight hundred and sixty, said libellants, by their proctors, filed, in the circuit court of the United States for the northern district of Illinois, the transcript of the record and proceedings had in the district court of the United States for the northern district thereof in appeal from said court to the circuit court aforesaid, which transcript is in the words and figures following, to wit:

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3 District court of the United States, northern district of Illinois.

Pleas in the district court of the United States for the northern district of Illinois, before the Hon. Thomas Drummond, judge of said district, and on Saturday, the twenty-first day of July, in the year of our Lord one thousand eight hundred and sixty, and of the independence of the United States the eighty-fifth year.

WM. H. BRADLEY, *Clerk.*

Libel.

Charles H. Walker, Tracy J. Bronson, William Kellogg, and George C. Walker,
v.
The Western Transportation Company.

Be it remembered, that on the third day of July, in the year of our Lord one thousand eight hundred and fifty-seven, said libellants, by Scates, McAllister, and Jewett, proctors, came into the clerk's office of the district court for the northern district of Illinois, and filed their stipulation for costs and libel in this behalf against said defendants as follows, to wit:

4 *Stipulation for costs.*

DISTRICT COURT OF THE U. STATES
For the Northern District of Illinois, ss:

Whereas a libel was filed in this court on the 3d day of July, A. D. 1857, by Charles H. Walker, Tracy J. Bronson, Wm. Kellogg, and Geo. C. Walker, against the Western Transportation Co., for the reasons and causes in the said libel mentioned, and praying that the same may be condemned to answer the prayer of the libellants, and the said libellants and John P. Chapin, surety, the parties hereto, hereby consenting and agreeing that, in case of default or contumacy on the part of the libellants or their surety, execution may issue against their goods, chattels, and lands for the sum of two hundred and fifty dollars: Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall pay all such costs as shall be awarded against them by this court, or, in case of appeal, by the appellate court.

TRACY J. BRONSON.
CHAS. H. WALKER.
5 WILLIAM KELLOGG.
GEO. C. WALKER.
JOHN P. CHAPIN.

Taken and acknowledged this 3d day of July, A. D. 1857, before me.
WM. H. BRADLEY, *Cl'k.*

Endorsed: Filed July 3d, 1860.
WM. H. BRADLEY. *Cl'k.*

Libel.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In admiralty.—In the district court of said district, of the August term, A. D. 1857.

To the honorable Thomas Drummond, judge of the district court for the northern district of Illinois:

The libel of Charles H. Walker, Tracy J. Bronson, William Kellogg, and George C. Walker, of said northern district, partners doing business under the firm name and style of Walker, Bronson & Co. in the city of Chicago, in said district, against the Western Transportation Company, a corporation created and doing business under and by virtue of the laws of the State of
6 New York, in a cause of contract, civil and maritime, alleges as follows:

First. That in the month of October, in the year of our Lord one thousand eight hundred and fifty-six, (1856,) libellants were largely engaged in the produce and commission business in the city of Chicago, and were shipping large quantities of grain in boats and vessels from said city of Chicago eastward by the lakes, and that the said respondents, the Western Transportation Company, were then, have since been, and still are, the owners of a large number of vessels and propellers, used and employed by them upon said lakes in the carriage and transportation of goods, merchandise, grain, and freights of all kinds to and from the port of Chicago, in said district, and the various other ports along the shores of said lakes.

Second. That on or about the seventeenth day of October, in the year of our Lord one thousand eight hundred and fifty-six, libellants shipped on board the

propeller Falcon, one of the boats of the said respondents, and being a boat of more than twenty tons burden, then lying in the Chicago river, six
7 thousand and fourteen bushels and twenty-eight pounds of wheat, to be
transported and conveyed on board said propeller Falcon from the port of Chicago to the port of Buffalo, and to be delivered by said propeller Falcon safely at said port of Buffalo to the agents of the libellants at Buffalo aforesaid, or to such person as libellant should direct.

Third. That said six thousand and fourteen bushels and twenty-eight pounds of wheat, at the time it was delivered by them, libellants, on board of said propeller Falcon, as aforesaid, was in good condition, and of the value of about seven thousand dollars; that the said propeller was one of a regular line of boats owned by the said respondents, and running between the said ports of Chicago and Buffalo, and all intermediate ports, and was then under the control and management of said respondents and their agents; that said wheat was, at the time of its delivery to said propeller for transportation, as aforesaid, the property of libellants, and of the value above stated.

Fourth. That said wheat was delivered by libellants into the possession,
8 care, and custody of the officers of said propeller Falcon in the usual
course of business, who undertook and promised to carry and transport the same safely and securely from Chicago to Buffalo, aforesaid, on said propeller, and there deliver the same to libellants' agents, or to such person or persons as libellants should direct, but that no written agreement was entered into by these libellants with the said respondents or officers of said propeller in relation to the transportation of said wheat, and no bill of lading therefor was signed by said respondents, or by any person on their behalf.

Fifth. That said wheat was not carried and transported by said propeller Falcon from Chicago to Buffalo, nor was the same, or any part thereof, delivered at Buffalo to the agents of libellants, or to any person or persons for libellants; but, on the contrary thereof, the said wheat, whilst on board the said propeller Falcon, as aforesaid, and in the possession, custody, and care of the officers of said propeller, then being the agents of said respondents for transportation, as aforesaid, was wholly lost and destroyed; and libellants charge
9 that said wheat was lost and destroyed on board of said propeller after
said propeller had left the wharf where said wheat was taken on board.

Sixth. That by reason of the failure of the said propeller Falcon to deliver said wheat at Buffalo, aforesaid, libellants have been greatly injured, and suffered loss and damage to the full amount of the value of said wheat, to wit, the sum of seven thousand dollars, for which the said libellants claim compensation of and from the said respondents; and libellants charge that said respondents were, at the time said wheat was so delivered on board their said propeller Falcon, common carriers of goods and freight for hire, and as such common carriers were, and still are, responsible to libellants for said wheat so received on board their said boat for transportation, as aforesaid, and that said wheat, having never been delivered by the said boat, or by the said respondents, or by any person for them, to the agents of libellants at Buffalo, or to any other person for
10 libellants, and having, by reason of such failure to deliver, became wholly
lost to libellants, respondents are now liable to them for the full value thereof.

Seventh. That libellants have often requested said respondents to make compensation for said loss, but they have always refused, and still do refuse to recognize their claim, or to make any satisfaction for said loss and damage, or any provision therefor, and have never paid any portion of the same, to the damage of libellants of seven thousand dollars.

Eighth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Whereupon libellants pray that a warrant of arrest, in due form of law, ac-

cording to the course of this honorable court, may issue against the said Western Transportation Company, that they may be compelled to appear and answer, under oath, all and singular the matters aforesaid; and if they cannot be
11 found, that an attachment may issue against their goods, chattels, and
property; and if none be found, that their credits and effects, in whomsoever hands they may be found in said district, be attached; and that this honorable court would be pleased to decree payment of the damages aforesaid, with costs, and that the libellants may have such other and further relief as he may be entitled to receive.

CHAS. H. WALKER.
WILLIAM KELLOGG.
GEORGE C. WALKER.
TRACY J. BRONSON.

SCATES, MCALLISTER, JEWETT & PEABODY,
Proctors for Libellants.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Tracy J. Bronson, being first duly sworn, deposes and says that he is a member of the firm of Walker, Bronson & Co., and one of the libellants mentioned in and who signed the foregoing libel; that he is acquainted with the contents of said libel, and that the facts therein stated are true.

TRACY J. BRONSON.

12 Subscribed and sworn to before me this 3d day of July, A. D., 1857.

WM. H. BRADLEY, *Cl'k.*

Endorsed: Let a monition in the nature of a summons issue against the defendant, with a clause of attachment against the property of the defendant, as prayed in the libel. Thomas Drummond to the clerk. July 3, 1857.

Filed July 3, 1857.

WM. H. BRADLEY, *Cl'k.*

And thereupon the following monition issued out of said clerk's office, to wit:

Monition.

District court of the United States, northern district of Illinois.

The United States of America to the marshal of the northern district of Illinois, greeting:

Whereas a libel has been filed in the district court of the United States for said northern district of Illinois, on the third day of July, in the year of our Lord one thousand eight hundred and fifty-seven, by Charles H. Wal-
13 ker, Tracy J. Bronson, William Kellogg, and George C. Walker, under
the firm name and style of Walker, Bronson & Co., against the Western Transportation Company, in a certain action, civil and maritime, for the loss of wheat therein alleged, to the sum of seven thousand dollars; and said libellants also pray that a warrant of arrest may issue against the said defendant: Now, therefore, we do hereby empower, and strictly charge and command you, the said marshal, that you summon and admonish the said defendant, the Western Transportation Company, if they shall be found in your district, that they be and appear before the said district court on the first Monday in the month of August next, at the United States court-room in the city of Chicago, in said northern district of Illinois, then and there to answer said libel, and make their allegations in that behalf; and you are hereby further empowered

and strictly enjoined and commanded to attach the goods and chattels of said company, and if none be found, then their credits and effects to the amount of seven thousand dollars; and have you then there this writ.

14 Witness the Hon. Thomas Drummond, judge of said district court, at Chicago, this third day of July, in the year of our Lord one thousand eight hundred and fifty-seven, and of our independence the eighty-second year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Marshal's return.

I have served the within writ, by leaving a copy of the same with Robin Robinson, agent of said company, this 13th day of July, 1857.

IRAM NYE,
U. S. Marshal.
By J. C. BULLOCK, *D'p'ty.*

Endorsed: Filed July 14, 1857.

WM. H. BRADLEY, *Clk.*

And afterwards, to wit, on the eighth day of September, in the year of our Lord one thousand eight hundred and fifty-seven, the said respondent, by Hooper Ayer and Semmes, proctors, enters its appearance herein, and files answer in the words and figures following, to wit:

Respondent's answer.

15 United States district court, northern district of Illinois.—In admiralty.

The answer of the Western Transportation Company, respondent, to the libel and complaint of Charles H. Walker, Tracy A. Bronson, William Kellogg, and George C. Walker, against it the respondent.

And now comes the said The Western Transportation Company, and, for answer to the said libel and complaint of the libellants, doth allege and propound as follows, to wit:

First. The said respondent admits the several allegations in the first article of said libel contained to be true in substance and matter of fact.

Second. As to the several allegations contained in the second article of said libel, the respondent admits that at or about the time therein stated the libellants did ship on board the said propeller Falcon a quantity of wheat for the purpose of having the same carried and transported from Chicago, aforesaid, to
the said city of Buffalo, and that the said propeller was of the burden of
16 twenty-tons and upwards, duly enrolled and licensed for the coasting
trade on the lakes; but as to the quantity and value of said wheat so shipped as aforesaid, these respondents have no knowledge except from what is stated in the said complaint, and they therefore leave the libellants to make such proof in reference thereto as they shall be advised and able to make.

Third. As to the several matters stated and charged in the third article of said libel, these respondents have no knowledge except from what is stated in the said libel, and they therefore leave the libellants to make such proof in reference thereto as they shall be advised and able to make.

Fourth. As to the several things stated and charged in the fourth article of said libel, the respondent admits that no written agreement was entered into by the libellants with the respondents in relation to the transportation of the said wheat; and that no bill of lading thereof was signed by the said respondent, or by any person in their behalf; and these respondents further say that the
said property was shipped on board the said propeller in the manner and
17 under the circumstances, and subject to the terms and condition herein-
after set forth, and none other or different, anything in the said last-mentioned article to the contrary notwithstanding.

Fifth. As to the several matters and things stated and charged in the fifth article of said libel, these respondents admit that the said allegations are true in substance and matter of fact, except in so far as the allegations are inconsistent with the matters and things hereinafter stated.

Sixth. As to the several matters stated and charged in the sixth article of said libel, these respondents admit that at the time therein stated it was a a common carrier of goods and freight for hire, as is therein stated and alleged; and as to each and every of the other allegations in the said article contained, the respondent denies the same in manner and form, as the same are therein stated and set forth.

Seventh. As to the several allegations in the seventh article of said libel contained, the respondents admit the same to be true in substance and matter of fact.

18 Eighth. As to the several matters alleged in the eighth article of said libel contained, the respondents deny the same, and each and every of them, in manner and form as the same are therein stated and set forth.

Ninth. And for answer to each and every of the matters stated and set forth in the said libel, and each of the several articles thereof, the respondents say, that at the time mentioned in the said libel they were common carriers of goods, property and merchandise upon the lakes and navigable waters connecting the same; that it was at the time mentioned the owner of the propeller Falcon in the said libel mentioned, which said propeller had been, and was at the time mentioned, duly enrolled and licensed for the coasting trade on the lakes and navigable waters connecting the same, under the act of Congress directing and authorizing the same, and that it, the said propeller, was at the time aforesaid engaged in navigating the lakes and navigable waters connecting the
19 same, between the city of Buffalo, in the State of New York, and the city of Chicago, in the State of Illinois, and intermediate ports and places, in the transportation of freight and passengers, as occasion of trade might require. And the respondents in fact further say, that the said propeller was at the time aforesaid a general ship or vessel propelled wholly or in part by steam; and that at the time in the said libel mentioned the said propeller Falcon was then lying at the port of Chicago, in the State of Illinois, engaged in the prosecution of one of her regular trips or voyages from the city of Buffalo to the said city of Chicago, and from thence back again to Buffalo aforesaid; and that while lying at the said port of Chicago, the goods, merchandise and property in their said libel mentioned, the same being goods and merchandise, and intended to be sold in the eastern market as such, was shipped, taken in, and put on board of said propeller for the purpose of being transported from Chicago aforesaid to Buffalo aforesaid on board of said propeller on her return trip from Chicago to Buffalo aforesaid, by the said respondents as common
20 carriers, and not otherwise; and that after the said goods, merchandise and property had been so shipped, taken in, and put on board of said propeller as aforesaid, and while the said propeller was lying at the said port of Chicago, the said propeller was wholly destroyed by fire, which happened to and on board of said propeller, and that by reason and by means of such fire, and not otherwise, the property so shipped, and being the same property mentioned and referred to in the said libel, was wholly lost and destroyed, and that the loss and damage to said property was wholly caused by the said fire, and not otherwise; by reason and by means whereof the said respondents were unable and were prevented from transporting and delivering the same at Buffalo aforesaid, and that it failed to deliver the said property for that reason, and no other. And these respondents in fact further say that the said fire was not caused by the design or neglect of the said respondent.

21 Tenth. And for a further answer to the said libel, and to each answering of the allegations contained in the several articles thereof, the

respondent says that at the time mentioned in the said libel the said respondent then was, and for a long time previous thereto had been, common carriers of goods, property and merchandise upon the lakes, between the city of Chicago, in the State of Illinois, and the city of Buffalo, in the State of New York; and that before and at the time of the shipment of the property in the complaint mentioned, upon the said propeller, it was well understood by and between the owners thereof and the said respondent, that before the said propeller left the said port of Chicago, upon her return trip to Buffalo, the said respondent, by its servants and agents, should make and deliver to the said owners a bill of lading of the said property, specifying the amount thereof, and the agreement between the said parties as to the carriage and transportation thereof from Chicago to Buffalo aforesaid, which said bill of lading was to be in the usual form, and to contain the customary and ordinary stipulation and agreements contained 22 in the bills of lading in use at the time by the said respondents in its dealings and transactions with the customers of the said respondent; and the respondent in fact further says, at the time last above mentioned the owners of the said property were among the regular customers of the said respondents, and well knew the form, tenor and effect of the bills of lading used by the said respondents, and were well acquainted with the terms and tenor and effect usually contained therein, and that the said property was shipped on board the said propeller by the owners of the same, with full knowledge thereof, and with reference thereto; and this respondent further says, that in and by the terms, tenor and effect of the bills of lading at the time in use by the respondents as aforesaid, the said respondents undertook and agreed to carry the property specified therein from the place of shipment to the port of destination, and there safely deliver the same, dangers of navigation, fire, and collisions excepted; and the respondents further say, that after the said property 23 was so shipped on board the said propeller, and before the same left the port of Chicago, and before any bill of lading thereof had been made and executed, the said propeller, by accident and misfortune, and without the fault of the respondent, together with all the property on board, including as well the property mentioned in the complaint as all other property on board said propeller, was wholly lost and destroyed by fire, in consequence whereof the respondent was unable and prevented from delivering the same at Buffalo aforesaid.

Eleventh. And further answering, the respondents say that at the time the said property was so shipped on board the said propeller to be carried and transported as aforesaid, it then was, and for a long time previous thereto had been, and still is, well understood by and among all persons engaged in the business of commerce and navigation on the lakes, including as well the owner and masters of steamboats, propellers, sail vessels, as the owners and shippers of property by such steamboats, propellers and sail vessels, that in 24 ordinary bills of lading in use upon the said lakes the words "perils of navigation, perils of the seas," and other equivalent words, covered and embraced losses by fire happening to or on board the said steamboats, and propellers, and sail vessels, upon which property might be shipped for the purposes of transportation. And the respondents further say, that the usage and custom so to regard the terms, words, and phrases before quoted, as covering and embracing losses by fire, was general and universal by and among all persons engaged in the shipment and transportation of property upon the said lakes; and that all the property of every description, shipped as well at the port of Chicago as at any and all other ports upon the lakes for transportation, was so shipped with reference to the meaning of the said words and phrases as above recited, and with the full understanding on the part of the owners thereof, and on part of the carriers of the same, that the said carriers were not to be made liable, or to respond for injuries and damage to the property so shipped,

caused by fire happening to or on board the steamboat, propeller,
25 or vessel upon which the same might have been shipped, unless the said
fire should have been caused by the negligence or misconduct of the owners thereof, his or their servants or agents. And the respondents in fact further say, that at the time the said property was so shipped, taken in, and put on board the said propeller, the said usage and custom was well known and understood by the owners of said property; and with full knowledge of such usage and customs, the owners of said property shipped the same on board the said propeller in view of and reference to such usage and custom, and well knowing that the said respondent did not nor would except and receive the same on board for transportation, or otherwise, except under and subject to the terms of bills of lading used by the said respondents under the meaning and understanding that losses and damage by fire were embraced in and covered by the terms and meaning of the words perils of the seas, perils of navigation,
or other equivalent words. And these respondents in fact further say,
26 that the said property being so shipped, and when on board the said
propeller was wholly lost and destroyed by fire, which happened to and on board the said propeller, and which wholly consumed the same, and the said respondent was thereby prevented from transporting and delivering the same at the port of destination. And these respondents further say, that the said fire was caused by inevitable misfortune, and not through the neglect, fault, or misconduct of the respondent, its servants, or agents.

Twelfth. That all and singular the foregoing premises are true.

Wherefore the respondent prays that this honorable court would be pleased to pronounce against the libel aforesaid, and to condemn the libellants in costs, and otherwise right and justice to administer in the premises.

THE WESTERN TRANSPORTATION CO.,
P. L. STEINBERG, *Pres.*

HOOPER, AYER & SEMMES,
Proctors for Respondents.

UNITED STATES OF AMERICA,
Northern District of New York:

27 On the 4th day of September, 1857, before me, at the city of Buffalo,
in the district aforesaid, personally appeared Pearl L. Steinberg, and made oath that he is president of the said respondent, the said The Western Transportation Company, in the foregoing answer named, that he has read the same and knows the contents thereof, and that the same is true in substance and matter of fact.

In witness whereof, I have hereunto signed my name and affixed the seal [L. S.] of the northern district of New York the said fourth day of September, 1857.

AURELIAN CONKLING,
Clerk and Commissioner of the U. S.

Endorsed: Filed Sept. 8th, 1857.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the sixth day of November, in the year of our Lord one thousand eight hundred and fifty-seven, said libellants, by Scates, McAllister, Jewett and Peabody, proctors, filed the following exceptions to the answer of the respondents, as follows, to wit:

28 *Exceptions to answer.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the district court for said northern district of Illinois, of the November term, A. D. 1857.—In admiralty.

CHARLES H. WALKER, TRACY A. BRONSON, WILLIAM KELLOGG, and GEORGE C. WALKER,
v.
THE WESTERN TRANSPORTATION COMPANY.
} Libel.

The exceptions of Charles H. Walker, Tracy A. Bronson, William Kellogg and George C. Walker, libellants, to the answer of the said Western Transportation Company, respondents.

First exception.

For that the several matters and things stated and set forth in the ninth article of the said respondents, said answers are insufficient in law, and do not constitute a good or valid defence either in law or equity to the action of the said libellants.

Second exception.

29 For that the several matters and things stated and set forth in the tenth article of the said respondents' answer are insufficient, and do not in law or equity constitute a defence to the case made by the libel and complaint of the said libellants, and particularly that the said tenth article is insufficient in this: that it admits the respondent to be a common carrier, and then undertakes to set up an understanding between the said respondents and their customers, including said libellants, as to the contents of bills of lading used by the said respondents, which would in fact exempt the said respondents from liability on account of any loss happening to any property whilst in their possession as such common carrier.

Exception third.

For that the several matters and things in the eleventh article of the respondents' said answer contained are not sufficient in law or equity to constitute a defence to the action of the said libellants, and particularly in this: that the said respondents, in and by the said eleventh article of their said answer, undertakes to explain away, by a custom and usage known to the 30 libellants, the effect and meaning of words and phrases to which the law has given a certain and determinate meaning.

Exception fourth.

For that the answer of the said respondents does not disclose any good or valid defence to the action of the said libellants, and is in other respects informal, uncertain, and insufficient.

SCATES, McALLISTER, JEWETT & PEABODY,
Proctors for Libellants.

Endorsed: Filed Nov. 6, 1857.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, at a term of the district court of the United States for the northern district of Illinois, to wit, the July term thereof, A. D. 1858, on the 24th day of July, 1858, in the record of the proceedings of said court is the following entry, to wit:

CHARLES H. WALKER, TRACY J. BRONSON,
WILLIAM KELLOGG, and GEORGE C. WALKER,
v. } Libel.
THE WESTERN TRANSPORTATION COMPANY.

31 Now come the libellants, by Mess. Scates, McAllister and Jewett, their proctors, and now comes also the respondent, by Mess. Hooper, Ayer and Semmes, its proctors, and by agreement this cause is submitted to the court upon the pleadings and proofs on file without argument when the same is taken under advisement by the court.

And afterwards, to wit, at the July term of said district court aforesaid, on the 21st day of July, A. D. 1860, in the record of the proceedings of said court is the following entry, to wit:

CHARLES H. WALKER, TRACY J. BRONSON,
WILLIAM KELLOGG, and GEORGE C. WALKER,
v. } Libel.
THE WESTERN TRANSPORTATION COMPANY.

Now come the parties, by their proctors, and the court after full consideration of the matters herein submitted, and being fully advised thereon, pronounces for the respondent, and dismisses the libel in this behalf.

It is thereupon considered by the court that the respondents do have and recover of and from the libellants the costs and charges in this behalf; and thereupon the libellants pray an appeal to the circuit court, which is
32 granted upon filing bond in the penalty of five hundred dollars, with George Steele as surety therein, who is approved by the court; bond to be filed within twenty days from the date hereof.

And afterwards, to wit, on the twenty-third day of July, A. D. 1860, the following notice in appeal was filed in the office of the clerk of said district court.

Notice on appeal.

UNITED STATES OF AMERICA,
State of Illinois, Northern District of Illinois, ss:

Of the July term of the district court of the United States for the northern district of Illinois, A. D. 1860.

CHARLES H. WALKER, TRACY BRONSON, WILLIAM
H. KELLOGG, and GEORGE M. WALKER, for the
use of the Chicago Mutual Insurance Company, } Libel.
v.
THE WESTERN TRANSPORTATION COMPANY.

On the rendition of a decree, this 21st day of July, 1860, dimissing the
33 libel in this case, the libellants pray an appeal to the circuit court of the United States for the northern district of Illinois from said decree, and tender George Steele as surety on the appeal.

SCATES, McALLISTER & JEWETT,
Proctors for Libellants.

We acknowledge service of a copy of the motion above for an appeal this 21st day of July, 1860.

J. M. S. CAUSSIN,
Proctor for Def't, per Westcott.

Endorsed: Filed July 23d, 1860.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 2d day of August, A. D. 1860, the following appeal bond was filed in the office of the clerk of said district court aforesaid, to wit:

Whereas an appeal has been taken to the circuit court, from the district court of the United States in and for the northern district of Illinois, in a certain cause wherein Charles H. Walker, Tracy J. Bronson, William Kellogg, and George C. Walker were libellants, and the Western Transportation Company
34 was defendant, by the libellants; and the said appellants are required, by the rules and practice of this court, to give bonds on such appeal to prosecute the same with effect, and to pay all damages and costs on the appeal in this court and the Supreme Court: Now, therefore, the stipulators undersigned hereby stipulate, in the sum of five hundred dollars, to prosecute the said appeal with effect, and to pay all damages and costs on the appeal in the circuit court and in the Supreme Court, in case such appeal shall intervene.

GEO. STEELE. [SEAL.]
CHARLES H. WALKER. [SEAL.]
T. J. BRONSON. [SEAL.]
GEO. C. WALKER. [SEAL.]

Endorsed: Filed August 2, 1860.

WM. H. BRADLEY, *Cl'k.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a full, true, and complete transcript of the record and proceedings had in the
35 cause wherein Charles H. Walker *et al.* are libellants, and the Western Transportation Company is respondent, as the same appears from the records of said court now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of said court, at office in the city of Chicago, this 2d day of August, A. D. 1860, and of the independence of the United States the 85th year.

WM. H. BRADLEY, *Clerk.*

Endorsed: Filed Aug. 2d, 1860.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 3d day of June, A. D. 1863, in the record of the proceedings of the circuit court aforesaid, in said cause, is the following entry, to wit:

CHARLES H. WALKER *et al.*
v.
THE WESTERN TRANSPORTATION COMPANY. } Appeal.

Now come the libellants, by their proctor, and leave is given to amend
36 the libel by admitting the eleventh article of the answer.

And afterwards, to wit, on the 4th day of June, A. D. 1863, the libellants, by their said proctor, come and file their amendment to the libel as follows, to wit:

United States circuit court for the northern district of Illinois.—In admiralty.

The special amendment to the libel of Charles H. Walker, Tracy J. Bronson, William Kellogg and George C. Walker, against the Western Transportation Company:

That libellants admit so much of the eleventh article of respondent's answer as alleges that at the time the property was shipped on board the said propeller to be carried and transported as aforesaid, (that is, from the port of Chi-

cago to the port of Buffalo,) it then was, and for a long time previous thereto
had been, and still is, well understood by and between all persons engaged in
the business of commerce and navigation on the lakes, including as well the
owners and masters of steamboats, propellers and sail vessels, as the
37 owners and shippers of property by such steamboats, propellers and sail
vessels, that in the ordinary bills of lading in use upon the said lakes
the words, "perils of navigation," "perils of the sea," and other equivalent words,
covered and embraced losses by fire happening to or on board the said steam-
boats, propellers and sail vessels upon which property might be shipped for
the purposes of transportation, and that the usage and custom so to regard the
terms, words, and phrases before quoted, as covering and embracing losses by
fire was general and universal, by embracing all persons engaged in the ship-
ment and transportation of property upon the said lakes, and that all the prop-
erty, of every description, shipped as well at the port of Chicago as at any
and all other ports upon the lakes for transportation, was so shipped with refer-
ence to the meaning of the said words and phrases as above recited, and with
the full understanding on the part of the owners thereof, and on the part of the
carriers of the same, that the said carriers were not to be made liable or
38 to respond for injuries and damages to the property so shipped caused
by fire happening to or on board the steamboat, propeller or vessel upon
which the same might have been shipped, unless the said fire should have been caused by the negligence or misconduct of the owners thereof, his or their servants or agents. And the libellants further admit that at the time the said property was so shipped, taken in and put aboard the said propeller, the said usage and custom has well known and understood by the owners of said property, and with full knowledge of such usage and customs, the owners of said property shipped the same on board the said propeller in view of and in reference to such usage and custom, and well knowing that the said respondent did not nor would accept and receive the same on board for transportation or otherwise except under and subject to the terms of the bills of lading used by the said respondents under the meaning and understanding that losses and damages by fire were embraced and covered by the terms and meaning of the words, "perils of the seas," "perils of navigation," or other equivalent words.

R. RAE,
Proctor for Libellants.

39 Endorsed: Filed June 4, 1863.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 16th day of June, A. D. 1863, in the record of the proceedings of said court in said cause is the following entry, to wit:

CHARLES H. WALKER *et al.*
v.
WESTERN TRANSPORTATION CO. } Appeal.

Now comes the respondent, and on motion Mess. Bates & Towslee are substituted as proctors in place of E. R. Hooper, esq.

And afterwards, to wit, on the 9th day of July, A. D. 1863, in the record of the proceedings of said court in said cause is the following entry, to wit:

CHARLES H. WALKER, TRACY J. BRONSON, WILLIAM KELLOGG, and GEORGE C. WALKER,
v.
WESTERN TRANSPORTATION COMPANY. } Appeal.

Now come the libellants, by R. Rae, esq., proctor, and, by leave of the court
withdraws the exceptions filed to the answer of the respondents, and
40 this cause, by like leave, is set down for hearing at the October ad-
journed term, A. D. one thousand eight hundred and sixty-three, upon

the libel, answer and proofs now taken, or other proofs that may hereafter be taken by either party before the hearing of said cause at said October term.

And afterwards, to wit, on the 8th day of October, A. D. 1863, comes the said Chicago Mutual Insurance Company, by R. Rae, esq., proctor, and files a petition to become subrogated to all the rights of the libellants herein, which said petition is in the words and figures following, to wit:

To the honorable David Davis, judge of the United States circuit court for the northern district of Illinois.—In admiralty.

The petition of George Steele, president of the Chicago Mutual Insurance Company, a corporation existing by virtue of the laws of the State of Illinois, in the matter of Charles H. Walker, Tracy J. Bronson and William Kellogg, against the Western Transportation Company, in a case of contract of 41 affreightment, civil and maritime, respectfully represents, that at the time the cause of action mentioned in said libel arose, the owners of said cargo were insured in the Chicago Mutual Insurance Company upon said cargo, and upon the said cargo being destroyed on board of the propeller Falcon, said cargo was abandoned to said insurance company and accepted by them, and the loss duly paid to the owners of said cargo, amounting to the sum of seven thousand dollars; wherefore petitioner, on behalf of said insurance company, prays that the honorable court would be pleased to make an order admitting said Chicago Mutual Insurance Company as the dominus litis in cause, and to intervene for their interest therein, according to the 34th rule in admiralty of the Supreme Court in such cases made and provided.

GEORGE STEELE, *P't.*

Sworn and subscribed before me this 7th day of Oct., 1863.

R. RAE, *U. S. Com'r.*

Endorsed: Filed October 8, 1863.

WM. H. BRADLEY, *Cl'k.*

42 And afterwards, to wit, on the 9th day of October, A. D. 1863, in the record of the proceedings of said court in said cause is the following entry, to wit:

CHARLES H. WALKER, TRACY J. BRONSON, WILLIAM KELLOGG and GEORGE C. WALKER,
v.
THE WESTERN TRANSPORTATION CO.
} Appeal.

On petition filed by the libellant's proctor, it is ordered by the court that the Chicago Mutual Insurance Company be subrogated to all the rights of the libellants in this case.

And afterwards, to wit, on the 22d day of October, A. D. 1863, in the record of the proceedings of said court in said cause is the following entry, to wit:

CHARLES H. WALKER, TRACY J. BRONSON, WILLIAM KELLOGG and GEORGE C. WALKER, and THE CHICAGO MUTUAL INSURANCE CO.,
v.
THE WESTERN TRANSPORTATION COMPANY.
} Appeal.

Now come the parties, by their proctors, and thereupon this cause is set down for hearing, and the court, after hearing the evidence and the arguments of advocates, takes time to consider of the same. 43

Libellants' proofs.

Deposition of Jirah D. Cole, jr., taken before John C. Reiley, a notary public of the city of Chicago and State of Illinois, in said cause, on the 12th day of June, A. D. 1863.

And the said Jirah D. Cole, jr., was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid. I carefully examined the said Jirah D. Cole, jr., and he did thereupon depose and say as follows, to wit:

My name is Jirah D. Cole; reside in Chicago; I am a miller; I know the libellants in this cause; I was in the employ of Walker, Bronson & Co. on the 17th day of October, 1856; the libellants shipped on board the propeller Falcon, on the 17th day of October, 1856, six thousand and fourteen bushels and twenty-eight pounds of wheat to be transported to the port of Buffalo; worth one dollar and fifteen cents a bushel at the port of Chicago; it was
44 worth much more in Buffalo; it was partly taken on at Walker's old warehouse, and the balance at Flint & Wheeler's warehouse; the libellants were the owners.

JIRAH D. COLE, Jr.

Subscribed and sworn before me this 12th day of June, 1863.

JOHN C. REILEY,
Notary Public.

45 *Respondent's proofs.*

Deposition of Nelson Woodworth, taken on behalf of the respondents, before George Gorham, United States commissioner for the northern district of New York, at Buffalo, in said State, on the first day of October, A. D. 1863.

And the said Nelson Woodward, being about the age of forty years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Nelson Woodward, and he did thereupon depose, testify, and say as follows, viz: I have been on these lakes over 31 years. I have been master of steam vessels for 14 or 15 years, besides 10 years as chief mate and sailing master; balance of the time before the mast in sailing vessels. As master of steam vessels, I have become well acquainted with the machinery
46 and equipments of steam vessels, including propellers. I was master of the propeller Falcon in 1856, at the time she was built; I built her, and commanded her for over 5 years; her tonnage was over 600 tons; she was one of the largest class vessels on the lake; I was master of her at the time she was burned; she was burned in Chicago river in October, 1856; she was engaged in trade between Buffalo and Chicago on the lakes; she had been in Chicago three days or so at the time she was burned; she arrived at Chicago from Buffalo with a cargo which she discharged; when she was burned she had taken on cargo preparatory to her return to Buffalo; she had not taken on full cargo. Up to the time she was burnt from the time she was built, she was in first-class condition as a passenger or freight-carrying propeller; she was in first-rate condition as regards protection from fire. I was acquainted with her boiler, furnace, fire-room, &c.; I built them, and examined them every spring and fall, and made it my business to know they were in perfect order, and did know it.

We had a full crew, 2 engineers and 3 firemen.

47 What was the character of the engineer and firemen as to being competent and experienced men in their business?

(Objected to as incompetent and leading.)

Their character was good.

(Same objection.)

I can say the same of the mates and balance of the crew. On the 16th Oct., 1856, some time in the afternoon, we commenced taking on cargo for Buffalo at Walker, Bronson & Co.'s warehouse, in Chicago; we took on some hides, some flour, and, perhaps, some other things. We left W. B. & Co.'s for Flint & Wheeler's elevator, some time in the afternoon. At sunset of the 16th it was so densely thick, caused by smoke and fog, I could not get to F. and W.'s that night, and was obliged to lay in the river all night. On the 17th I steamed up the river as far as Flint and W. elevator, where I took on board, as near as I remember, 6,000 bus. wheat, or thereabouts. We were about 2 hours taking it on. This was all the wheat we had aboard. I understood it to be Walker, B. & Co.'s wheat. After taking on the wheat, I got orders to go to Craigen's packing-house to take on board some beef. The packing-house is on the south
branch of the river, some 3 miles from the mouth. We were there
48 probably an hour and a half, and left there to come down to our dock,
(W. T. Co.'s,) at foot of Dearborn street. We got down as far as opposite Huff & Co's packing-house; the night being very dark, was obliged to tie up for the night. There was fog and smoke combined, which made it so densely dark, after 8 o'clock, you could not see a man six feet from you; we could not see to go down the river. We made fast at Huff & Co.'s dock, and gave the usual order to my officers to see the vessel well made fast, pumped out, fires wet down, &c., and I went to bed. We had supper about seven o'clock. My crew was all aboard. We had been up for three nights in succession, and every man was tired out, and turned in as soon as he could, with the exception of the watchman. We had been up discharging freight along the west shore of Lake Michigan, and at Chicago. Between 2 and 4 o'clock in the morning one of the firemen came to my room and reported to me that the vessel was on fire. I immediately came on deck, and had all hands called immediately. We first went
to one fire-engine, at least one of them, for the other was in the midst of the
49 flames about the smoke-stack. We threw water on the fire; hallooed fire to
alarm the people, and continued to do so till the fire drove us from the vessel. We got into our boat alongside and scuttled the vessel. The fire continued to rage, and the vessel was burned to the water's edge, and sunk in the course of the morning, and everything on board of her was burned, including the wheat on board. The crew hardly saved their clothing; very little of the clothing of the crew was saved.

2. If anything was omitted by the master or crew which might have been done towards saving the vessel or cargo, state it.

(Objected to as improper and leading.)

Everything that I and my crew could do was done towards saving the vessel and cargo.

Cross-examined by Mr. Hibbard, who desires it expressly understood that by his appearance he does not waive any objection to the taking of this deposition; but that he appears for the purpose of cross-examination, by the request of Mr. Robert Rae.

My chief mate was Alvin Dodge; 2d mate, William (?) Baker; chief
50 engineer, Thomas Daily; 2d engineer, John Dorsey. I had known
these men from 2 to 6 years, except 2d mate, about a year. I knew the names of three firemen, their names were Philip and Patrick Walsh and McGrath. The Walshes had been with me from 1 to 4 years in the capacity of firemen. I shipped McGrath in Buffalo; he was with me a part of the season of 1856; this was all I knew about him. We generally carry a crew of 20 men; I had the whole of them on board then; this includes officers and men. Tobias Low was a watchman on the vessel. I have given the names of all I now remember. I do not think there were any men on board whose names or whom I did not know. I shipped my crew as I needed them; they might have been with me

4, 5, 6, or 8 months, or one month ; I guess there were men on board who had been on board only a month, I don't know; only, however, as a deck hand or waiter, in no other capacity. The deck hands and waiters I consider a part of the crew. I can't say whether there were men on board at that time of whom I had never heard of before they came on board my vessel.

51 Q. What did you mean when you stated, in substance, that the balance
of your crew, besides the mates, engineers and firemen, had a good character as competent and experienced men in their business.

A. I mean I gave them that reputation myself, for the prompt and enegetic moves they made in obedience to my orders during the fire. This was all I meant. We turned in the night of the fire between seven and eight o'clock; the night was as thick then as it had been before. Between the time I turned in and the time the firemen reported the fire to me I had not been on deck ; I was asleep all the time. The fireman was not the watchman I spoke of.

Q. Who gave the orders to the watchman to be on the watch.

A. It is his duty to be on deck from 6 p. m. to 6 a. m. This is all I know about his beng on duty. I gave no orders to the watchman. The watchman's name was Tobias Low. He had nothing to do towards discharging the vessel these nights before, when I say the crew were up. It was his duty to watch
every night; I presume he had been on watch all during these former
52 nights. The firemen's room was on the main deck at the extreme
aft end of the vessel. My room was the extreme forward end of the cabin, perhaps 25 to 50 feet aft of the stern. I first discovered the fire around the smoke-stack on the promenade deck ; I came aft from my room on the prom. deck. From the character of the night it was very difficult to describe the state of the fire when I first saw it. I don't think you could distinguish a fire, no matter what the size of it, more than 50 feet away, owing to the darkness, smoke and fog. I am satisfied you could not see a light 8 feet from you. It was the most unusual state of things that ever happened in that river ; it was very unusual when we turned in. It is usual to have one watchman when a vessel is laying at a dock ; that is usual in the best weather and clearest nights. I don't remember where I first saw the watchman when I came on deck. I first saw the 1st and 2d mate ; I kicked their room door open and they came out, as I came aft from my room when I was first called ; the next room was the engineers', and I routed them out in the same way ; they were the next men
I saw ; I can't tell who were the next ; I saw the whole of them ; I cannot
53 remember seeing the watchman, except as one of the crew, while we
remained on the vessel ; I do not remember that I did see him at all ; I do not think I recognized any of the men except the engineers and mates, as I called them, while we remained on the vessel. We had a full complement of buckets, I do not remember how many ; there is a heavy penalty hanging over me if they are not there, and this is the reason I know they were there ; I don't remember the number which makes a full complement for that class of vessel. We had two fire-engines on board and one force-pump ; the engines were worked by hand and the force-pump was worked by steam ; the engines and force-pump were in good order. I know, because the law requires it from day to day ; I know the officers of the vessel made it a part of their business to know they are in order from day to day. I had the day previous to the morning of the fire personally examined a portion of these engines and pump ; I had examined the hose, 2 pumps on deck and pails ; I had examined
them because I had passed them from hour to hour in my work during
54 the day ; I saw the engines at work washing deck ; my mind was on my
business, and it is a part of my business to know that these things are in order and right ; I had given them no more examination that day than I did every day ; it was a part of my routine to know these things ; this is all I mean. None of the crew were ashore at the time the fire occurred ; two of them I understood

had got on the dock in the evening to go up town, and it was so dark they could not go; they were deck hands, and were gone about five minutes. I had not given permission to any others to go ashore. The crew had been trained with reference to fire, by practicing on the pumps every day and forcing water through the hose, this being a part of the care of the vessel; this was all the training they had had in using these things for the ordinary purposes of the vessel; we used one engine to try and put out the fire; we could not use the force-pump because there was no steam on the vessel. The fire seemed to be about amidships, below the promenade deck, and seemed to be issuing out from
every place it could come from when I first saw it; I saw the smoke
55 rolling out of the windows on the port side; the sides of the boat were
closed except the sliding windows; as near as I can remember, the first time I actually saw blaze was when I was in the boat alongside, scuttling the vessel, and a piece of the rail fell into the boat; this might have been 20 minutes to half an hour after I first came on deck. There was no wind that night; when I came on deck the vessel was all a fire between decks.

Re-direct examination.

Q. Up to the time of the fire had all of the crew discharged their duties satisfactorily and with competency?
(Objected to as leading and improper.)
A. They had.

N. WOODWORTH.

Endorsed: Opened for the libellants' proctor, Mr. Rae.
WM. H. BRADEY, *Clerk.*
October 6, 1863.

56 Depositions of Thomas Daly and Alvin Dodge, taken on behalf of the respondents, before Azariah T. Galt, a notary public of the city of Chicago, State of Illinois, on the twelfth day of October, A. D. 1863.

And the said Thomas Daly was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid. I carefully examined the said Thomas Daly; he did thereupon depose and say as follows to wit:

1st int. What is your name, age, occupation and place of residence?

Ans. My name is Thomas Daly, age; thirty-one; occupation, machinist and engineer; I live in Detroit, Michigan.

2d int. Were you on board of the propeller Falcon when she was burned in the Chicago river, in October, 1856; and if so, in what capacity?

Ans. I was, as engineer.

3d int. Please state how the boat was constructed so as to guard against fire,
and also all that you know about the manner in which the fires on that
57 occasion were fixed for the night, and how and in what manner the fire
originated, and when and where the fire was first discovered.

Ans. The boat had two return flue boilers; there was a space of about a foot between the boilers; there was a space of some ten inches between the boiler and bulkhead for a coal-bunker; there was a distance of about a foot above between the deck and the top of the boilers; there was a space of about a foot or more around the smoke-stack as they come through the hurricane-deck; those spaces through the deck were sheeted with tin and sheet-iron to protect them from the fire. In these boilers there was water all around except directly back, and the doors from the back were from eighteen to twenty inches from the end of the flues; to the door back of this back-head, where the fire went up, there was a vacant space of eighteen to twenty feet where the engines went up, ex-

cept a stanchion or two which upheld the upper deck. The nearest point from the
wood-work to the boilers was not less than ten inches, except the water-
58 bottom and saddle for the support of the boiler—these the boiler rested
upon; she had a brick fire-floor; it was entirely covered with brick; this
was entirely fire-proof; you could build a fire right on it and it would do no
damage; she was as well protected from fire as boats usually are. We had
either two or three fire-engine pumps for hand; we had a poney or donkey-
engine with a double-acting pump, which throws a continual, steady stream; we
had a full complement of good hose and buckets, in good order and convenient
to get at. All the apparatus appertaining to the fire department, except the pails
and bucket, belonged to the engineer department, and were in good order; there was
no defect whatever connected with her fire department within my knowledge.
That was my third season on board of the propeller as engineer. She was as well
guarded at this time as she had been at all previous times. At six o'clock in the
evening of the day she was burned, I went on board of the boat at Hough's packing-
house, where I was waiting for her. It was a very foggy evening, so thick so
that I could not see the boat at three times its length. I was down here
59 getting a wrench made for the engine, and went in search of the boat;
when I got as far as Hough's packing-house, I heard the boat coming, but
could not see her, although she could not have been more than three times her
length from me. I knew it was the boat by the sound of her bells by which we
work the engines. I then went on board of her. I got through the packing-
house to get on to their dock; the dock was boarded up at each end of the
house, so I could not get on to it except through the packing-house; they had
done working in the packing-house, and I was shown through by some man I
took to be a watchman. I went on board of the boat, which was fastened till it
cleared up, so that we could go down the river. I think we had supper as soon
as we were made fast to that dock. I sat in the cabin most of the time till ten
o'clock in the evening; about that time I retired to bed. In order to go up in
the cabin we had to go right over the fire-hold. The main entrance to the
promenade deck up the companion-way is right by the fire-hold; I think
60 that is the way I went. The fires when put out were all wet down; I
mean the water was let on them. I do not recollect whether I was there
that night when the fires were put down. My second engineer was John Dorey,
who is now in California, and has been for some time. I consider Dorey a very
good and careful man; he was on board that night in charge of the engines.
I was awoke up between two and three o'clock in the morning by the cry of
"fire." I jumped out of bed as quick as I could and went to the companion-
way, but could not go down between decks, the smoke was so thick; by this time
the whole crew was up on deck; we got pails and commenced throwing water
down the companion-way; we threw water on there till we found we made no
impression, and till the flames broke out. When I first saw the fire it appeared
to be in the vicinity of the boilers; we exerted ourselves to subdue the fire until
our safety required us to leave the deck. I went in my room to get on a coat
before I left; the flames were then bursting out of the gangway and a window
near the gangway, on the side next the dock; whilst I was in my room
61 somebody hallooed to me, I think it was the second engineer, saying,
"Hurry, Daly, or the decks will burn away under you," or words to
that effect. There had been no fire since six o'clock in the evening in the en-
gines. The hand engines were on the promenade deck and the hose was down
below, so that we could not get to them. I climb down the side of the boat and
got on to the dock; at this time there was a flame of fire out of the gangway
and window on each side of where I come down. When the alarm of fire was
first given there was a man sent to toll the large bell on top of the pilot-house.
When I got on the deck the heat was so intense that we could not with safety
stay on there; we got into our yawl-boat and shoved across the slip; as soon

as we arrived on the land the mate and myself went through the little village alarming the inhabitants. The fire was so far advanced when I first saw it through the companion-way, that it was impossible to do anything but to get away with our lives. There was no means of escape for us except by the
yawl-boat, because of the boarding up the two ends of the shed, and the
62 door of the packing-house was closed. I always gave orders when on
board to have the fire-hold wet, but on this occasion I was not on board when the engine stopped.

4th int. Is there anything farther which you can now state as to what caused this fire, where it first made its appearance, what was done to extinguish it, or whether it occurred by accident merely, or by negligence or design?

Ans. The cause of the fire I don't know. Two of the firemen, who were with me at that time, had been with me for three years, and I consider them very careful, prudent men; the second engineer I also consider a careful, prudent man. I do not think the fire was caused by any negligence on their part.

Cross-examination by Mr. Rae.

I was in bed when I was first called up at the fire. I do not know who called me; I think it was one of the firemen; I don't know that it was the
master. It was the general alarm that aroused me. I put on some of
63 my clothes—I think boots and pants—when I was called. Just before
I left the boat, I went in to put on my coat. My room was convenient to the fire. When I first went out I did not see the fire till a little after I went out. When I first got up I could see nothing but smoke; this was coming out of the gangway. The first thing I did after I got up, I believe, I made an attempt to get the hose from between decks aft. I did not get it. The heat and smoke was so intense that I could not enter between decks. I would have attached the hose if I had had it. I don't recollect the position of the pumps exactly. There was a pump on the forecastle deck. My impression is, there was a pump on the promenade deck, abaft the cabin, that I would have attached the hose to. Where the hose was, from this pump, might have been from thirty to forty feet—not on the same deck. I do not know that the hose was got and put on the pump. I did not hear any of the crew say this. I do not know that Jacob Mellen and others got the hose on the pump. Don't know that
there was such men on board. I saw the master all the time I was up.
64 I did not see him working with the hose. Saw no hose on the pump.
I got pails when we could not get the hose. We got as many pails as we could handle. They had not heaving lines; there was no occasion for them; we used the pumps. I could not tell how many pails I threw. I could not tell whether I threw more than one; the presumption is, I did. The majority of the crew all around there threw water; also the captain, mate, and deck hands, and firemen, were there. I did not see the watchman. I could not say distinctly, now, who I saw. As soon as we stopped throwing water we made our escape on the dock. When I left the captain and the crew were trying to scuttle her. Could not say what they were doing, except from hearsay. While I was on the boat, I do not recollect of seeing the master or the officers drilling the men in reference to putting out fire. I had been on three years at this time. Through the whole length of the boiler the wood came up close to the outside of the
boilers, and directly within that there was a thickness of water four to
65 six inches thick. This water was at least at the boiling point when
steam was in process of generation. There was a wooden bulkhead alongside of the boilers, on the outside of the two, and this was against the boilers, and on the top, above the boilers, it ran all the way forwards to the cross bulkheads, and below it ran along the side to a point about three feet from the mouths of the furnaces; there was a foot, perhaps a little more, from

between the line of the bulkhead and the mouth of the furnaces; the boiler was about eighteen feet long. The fire was made at the front end of the boilers, and the smoke returned and escaped at the front end, and along the boilers; at each boiler the smoke entered at a leg of the arch, and thus was carried to the smoke-pipe. I think the nearest place of the wood to the smoke-pipe was eight or twelve inches. I do not know that she was inspected that spring as to hull; it is not usual to inspect freight boats. I was in Chicago when the machinery was taken out; I inspected the removal of it. We took it out for the
66 Western Transportation Company. The hull was towed out and sunk
in the lake. I left the boat in a very short time after I was called out of bed.

Re-examination by Mr. Bates.

The entire boiler was enclosed with a current of water at the last place four inches thick.

THOMAS DALY.

And the said Alvin Dodge was by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the cause aforesaid. I carefully examined the said Alvin Dodge, and he did thereupon depose and say as follows, to wit:

1st int. What is your name, age, occupation, and place of residence?

Ans. My name is Alvin Dodge; my age is thirty-two; occupation is seaman. I live in Detroit. I was mate on board of the Falcon the time she was burned. I was on her about a month the season before, and all that season up to
67 the fire. At the night she was burned we made fast along the dock of
the packing-house, because it was so thick and dark we could not go down the river. This was about seven o'clock in the evening. After coming to and making the boat fast I sat in the cabin till after ten o'clock, with the captain and both engineers, Daly and Dorcy, who is now in California. Before I went to bed I went below and through the vessel's hold, and tried her pumps on main deck, and took a general survey of the vessel all through, except the fire hold; I did not go in there. I cautioned the watchman to be very particular about the vessel. I found all safe at this time. This was some time between ten and eleven o'clock that I went down. I then turned in and was awakened by the captain bursting my door in, and told me the boat was on fire. I jumped out and ran aft; called the men as I was going aft; told them to rig the pumps; tried to get down on the main deck to get the hose, and the fire drove me back. and I then got the men to work throwing water with the buckets; we did not fling but a very few buckets of water before we were driven away by
68 the fire. At that time there was no way of getting from the boat to the
dock only by the small boat, which was made fast forward, between the propeller and the dock. As soon as we got ashore we ran out and gave the alarm. When the engineer and myself came back from giving the alarm the boat was alongside for the purpose of scuttling her. Soon after we got back the mast fell on the boat, and hurt the second mate some. I was alarmed between two and three o'clock in the morning. It was when the captain called me. When I first saw the fire it was flaring up by the smoke-stack, and seemed to come from the fire-hold. The buckets, hose, and engines were in their proper places when I made the examination, before turning in. I have no idea of what caused the fire. I think it started in the fire-hold, so far as I could discover. Everything was properly done, and everything that could be done, for the safety of the vessel.

Cross-examination by Mr. Rae.

I do not know *were* the watchman is now; *is* name is Tobias Lowe;
69 he had been there as watchman ever since it was fitted out in the spring;

he had been keeping watch the night previous; is supposed to have been up every night; on that night I told him be very careful; I told him to go around the boat frequently; go below frequently, and try the pumps frequently and keep a sharp look-out for fire; I do not know why I gave him such special instructions; that night it was a very thick night; I always gave him particular instructions; I do not know that it was necessary to instruct him specially; it was a habit with me; I then retired to rest; that was about the last thing that I did before I turned in; Captain Woodworth woke me up; I did not put on my boots; I put on my pants; I put on my boots after I left the boat; I got also two coats to carry with me; after I got out of bed the first thing I did was to call the men to rig the pumps, and to get the hose, but we could not get it, the hose for the fire; I know the hose was not got by any of the crew; I know if it could have been got I would have got it; I know that James Mullen, Henry
Miller, and George Davis did not get the hose; it was not got at all;
70 after trying to get the hose I got the men flinging water with the buckets;
I do not recollect whether I threw any water; we had to run for our lives; I do not think it exceeded five or eight minutes from the time I got up till we had to leave; we did not scuttle her before I left her to get on the dock; after I got on shore I ran out back from the river and hallooed fire; I could not say how long before I returned; about twenty minutes, I think; when I returned the boat was going alongside to scuttle her; it was about three-quarters of an hour, not more, from the time I got out of bed till they commenced to scuttle it.

A. DODGE.

Endorsed: Filed Oct. 22, 1863.

WM. H. BRADLEY, *Clerk.*

71 *Libellants' rebutting proof.*

Deposition of Joseph H. Lathrop, Joseph Morton, and Oramel S. Hough, taken for the libellants, before John C. Reilly, a notary public, of the city of Chicago, and State of Illinois, on the 2d day of October, A. D. 1863, and 30th day of September, 1863.

Joseph H. Lathrop, a witness of lawful age, being by me first duly cautioned and sworn, on his oath deposeth and says: I was in the employ of Huff & Co., in the year 1856, when the propeller Falcon was burned; I was engaged there as their foreman; their packing-house was situated on the south branch of the Chicago river, near South Halsted street; I knew the propeller Falcon; I saw her moored at the dock of Huff & Co. in October, 1856; she lay alone; I could not say how near other vessels were to her; there was no vessel near her; no
vessel within a hundred yards of her; their packing-house of Huff &
72 Co. was outside of the city limits; there was no other houses or buildings
within a hundred yards of their packing-house; when I first saw the propeller Falcon on fire, it was about two o'clock in the morning; when I first saw her the flames were bursting out of her upper works near the after part of the vessel, somewhere near her smoke-stack; when I first saw it, it was but a little light; it had not yet got under way; it was enough that I could see it from where I lodged; the first effort we made was to try to get her away from the dock to prevent the flames getting to the shed; when I arrived I found Mr. Huff's watchman there; when I first got there I don't recollect what he was doing; when we first got there the first thing done was to cut the lines that fastened the propeller to the wharf; we then shoved her off from the dock, and the wind being against us, would blow her back; we repeated that some 3 or 4 times; we shoved her off with board or plank, or whatever we could get to shove her off with, and after we had repeated that several times and we saw it was no use, that we could not keep her away from the dock, we then went to

remove the property, to save what we could of that. The fire could probably have been put out when I first saw it, if enough water could have been
73 got to put on it; I hardly think the fire could have been put out if the crew had been there with buckets and had attempted to put out the fire; it would have taken a pretty strong stream of water to put it out when I first got there; when I first saw it I was 3 or 4 hundred feet away from it; I could not judge when I first saw it whether it could have been readily put out or not; by the time I put on my clothes and got there, it had increased so that it was a considerable fire; I saw one of her crew when I got there; I can't say how long that was after I got there; to best of my recollection it was but a few minutes; he said he wanted an auger to bore a hole in her; this was, I think, before she was hauled into the stream; I can't say where the crew were; it was always a mystery to me what became of them; I know of no effort made by the crew to haul the vessel into the stream; if we could have got lines across the river we could have easily hauled her across the river; we could only get her off a little way from the dock by our efforts; I did not look particularly for any of the crew; I was looking more particularly after Mr. Huff's property than
74 the vessel; after some time we got a dredge-boat from the dredging machine and got her out into the stream; I did not see any of the propeller's crew there, helping at that time, that I knew; after the buildings were on fire our next effort was to get her away from the dock, so as to prevent her from sinking at the dock; I did not see any of her crew aboard of her at the time; did not hear her bell ring at the time; I could not say how near the fire was to her smoke-stack; when I first saw the fire it was at the after part of the vessel and the wind was blowing right hard on to the shore towards the shed; it might have been near the smoke-stack and might have been aft it; the only instance that I know of any one of the crew being there to assist, was the one who spoke to me and asked for an auger.

Cross-examined by Mr. Bates.

I saw the Falcon shortly after she came up to that dock on that evening; the weather that night was very foggy, and I supposed that the reason that she came there that night was, that it was so foggy, and it was difficult for
75 her to get down the river; it was about the middle or latter part of the month of October, 1856, that she came to there; the night was a thick, muggy, foggy, and cloudy night; I don't recollect whether it was windy or not; she lay about three miles from the junction of the north and south branches of the Chicago river; I think it rained a little that night; I don't think there was any thunder or lightning; the navigation of the river from Huff's down to the junction was good at that time; there was a good depth of water, but the channel is wider now than then, having been dredged out; it was from five to ten minutes from the time I was awoke by the alarm of fire till I got down to the propeller; it was Huff's watchman gave the alarm; we could push the propeller away from the dock, but we could not keep her away, because the wind blew so fresh on to the shore; after I reached there I don't think the fire could have been subdued by any of the ordinary means that they had on propeller at that time; if they had had 3 or 4 force-pumps they might have done it, but I don't think they could have put it out with one; this occurred not far from 2
76 o'clock in the morning; I am not able to state where the boats of the propeller were at the time I reached there; my first object was to endeavor to save Mr. Huff's property; my first object was to prevent the flames from being conveyed from the burning vessel to Huff's shed; when I first reached there, my attention was more directed to the condition of Mr. Huff's property than it was to the condition of the boat; I did not see any of the officers of the boat; she was constructed with an upper cabin, same as now; if the

crew and officers had been below at work, I could not have seen them from where I was standing; the channel of the river opposite to Huff's warehouse at this time was about two hundred feet; it was about 8 or 9 o'clock in the evening when I first saw the propeller there; it was earlier in the evening when she first moored there; I think I *now* the character of the night and the condition of the river; I don't think that the propeller could have gone on that night down the river.

Re-direct.

77 When I first got there my first attention was directed to the boat, and I did not turn my attention to the saving of Mr. Huff's property till I saw that the boat could not be removed. It was about ten minutes from that time of the first effort was made till we got her out into the stream. It was from an hour to two hours till we got her away from the property.

Re-cross.

My recollection of all the facts and circumstances were much fresher seven years ago, when my deposition was given, than now.

JOSEPH H. LATHROP.

Subscribed and sworn before me this 30th day of September, A. D. 1863.

JOHN C. REILEY,
Notary Public.

78 The appellees in this cause, by Bates and Towslee, object to the foregoing deposition, and will move the court to suppress the same as wholly incompetent and irrelevant to prove that the fire which caused the destruction of the property of the libellants was the result of the negligence or design of the owners of the said propeller, and the same objection is hereby made to any other or further evidence not tending to prove that the fire which destroyed the Falcon and her cargo was caused by the negligence or design of the owners of the said Falcon. This objection was noted on a subsequent day to the day of taking said deposition.

JOHN C. REILEY,
Notary Public.

79 Joseph Morton, a witness of lawful age, on his oath deposes and says: I have resided in Chicago since 1842; I was here in Chicago when the Falcon was burned; when I first saw the Falcon I went into the packing-house; went to the front door and asked Mr. Huff's watchman why he did not rout out the crew and cut her loose and get her away from the dock, so that she would not burn up Huff's packing-house. I took an axe out of his hands, cut the lines myself, and hallooed to the crew to haul her from the dock. I got no answer from the crew and I hallooed to some men that were standing round and coming into the packing-house to take poles and shove her off. I heard nothing from the crew up to this time; did shove her off full length of the pole out into the river; we went to the stern to push her off, and the stern come into the dock; again I ran to the further end and got on to the top of the shed and hallooed to the crew, to get a line in the boat and haul her across to the other side of the river; they made no answer, and I went up to the other side of the shed, and I saw six men in a yawl upon the outside of the propeller, five or six on a point across the slough, on the same side where the packing-house is, and not more than four rods from where I stood. I hallooed to them for God's sake to come and get a line and take her away, so as not to burn up the man's house; they made no answer to me; that is all the circumstances about the case that I know of. I

then went to work about the shed to save some property; when I first saw the
fire on the propeller it was near to the smoke-stack; the only light I saw besides
was the light in the packing-house in the hands of the watchman. I was there
some little time before Mr. Lathrop got there; it was ten to fifteen minutes before
I saw the fire till I saw the crew of the propeller; when I first saw the crew
they were on the outside of the propeller, working on this point, making for the
other men; there was not a third of her on fire at this time, of her upper
80 works; I could not see any through her hull or in her hold at this time; all
the fire that I saw was coming right around the smoke-stack; they could
have heard me from where I stood, they could have heard me on the yawl, or
the point of canal too; they were about four rods from where I stood; from
where I stood those on the point were off about four rods; those in the boat
were not over three rods away. I did not see them put any or seemed
to care whether the boat burnt or not.

I did not hear the bell of the propeller ring; did not hear any one on board
of the propeller shouting fire; the wind blowed towards the stern; the wind
was from the north-west when I first saw the fire; I can't say if the crew had
helped us if we could have put it out, because I did not know how much she
was on fire within. I was there all the time till she was burned up; I did not
see any of the crew till the next morning at nine o'clock; I saw no smoke coming
out of her sides, and her sides were not broken till I broke them in; I could
not see what she had in her hold; I knew George Scott; he was there at the
time; he was watchman of the packing-house; when I first saw him he
81 was standing in the packing-house door with a lantern and axe in his
hand; he gave the outcry, and giving an alarm of fire; there was
another man there I did not know; he went down ahead of me; from the time
that I called to the crew they had time to have bored a hole in her hold and
have scuttled her; they had ample time to have taken her away from the dock,
and saved the house.

(All the foregoing testimony objected to as irrelevant and incompetent to prove the cause of the fire on board of the Falcon, or that it occurred from the negligence or design of the owners thereof.)

Cross-examined by Mr. Bates.

I do not know anything of the cause of the fire on the Falcon, or how it com-
menced; I don't know who was on board of the Falcon at the time the fire
commenced; I don't know in what part of the vessel the fire commenced; I
can't tell how far the fire had progressed inside of that vessel; when I first saw
the fire the wind blew pretty fresh; it was a dark, foggy night; the wind
82 blew fresh from the northwest, and blew the boat right on to the bank;
I did not see what was going on inside of the boat; I did not go on board
of her, and know nothing of the efforts made inside of her to put out the fire; I
first saw the fire back of the smoke-stack, between that and the stern of the
vessel.

JOSEPH MORTON.

Subscribed and sworn to before me, this second day of October, 1863.

JOHN C. REILEY, *Notary Public.*

Oramel S. Hough, a witness produced on behalf of the libellants, being by me first duly cautioned and sworn, on his oath deposeth and says:

My name is Oramel S. Hough; I reside in Chicago; my age is forty-one years; I am a beef and pork packer, and dealer in provisions; I have no interest of any nature or kind in this suit, but am one of the plaintiffs in the suit pending in the circuit court. I think, on the morning of Friday, October 17th

or 18th, 1856, one of my men came to my house at about ½ past two in
83 the morning, woke me up, and said the packing-house was on fire; I dressed myself, jumped into my wagon, and run the horse, and reached the packing-house as soon as possible; I found the propeller Falcon moored at our dock, hurricane-deck burned off about ⅗ of the length of her, and our sheds, the north end of the buildings, on fire, the flames out of the roofs of the buildings; I went round our packing-house to the slough, on the west side of our house; the propeller laid up stream, her bow in the slough; I saw across the slough, about 60 feet, several men standing, who I called on to come and help move the propeller from the dock before she sunk; asked them if they had a small boat and a line that they could run across the river with; I got no answer from them; I sent one of my men to a dredge to get a boat, which come, and we got a line and hitched to the shaft at the stern of the vessel, and carried it across and tied it to a tree, and hauled her into the middle of the river; it was now daylight; a tug came along, hauled her across the river, and she sunk; I saw none of the crew on our dock till after daylight; George Scott, our
84 watchman, is dead; he has been dead over five years.

(Same objection made by Mr. Bates to this testimony as to the two preceding depositions.)

Cross-examined by Mr. Bates.

I don't know anything about the cause of the fire, or in what part of the ship it originated, or anything that was done on board to suppress it, till I got there; I lived at that time, I should think, about two miles and a half from the packing-house; I got into the same wagon my man drove down in, that aroused me; I think it was about twenty minutes from the time I was aroused till I reached the packing-house; when I reached there about ⅗ of the upper works of the Falcon were on fire; the men that I hallooed to on the other side of the slough, that made me no answer, I supposed to be the crew of the Falcon, but I don't know who they were.

ORAMEL S. HOUGH.

Subscribed and sworn to before me, this 2d day of October, 1863.

JOHN C. REILEY, *Notary Public.*

Endorsed: Filed Oct. 22, 1863.

WM. H. BRADLEY, *Cl'k.*

85 The deposition of George Scott, taken on the fifth day of March, A. D. 1857, in the cause, wherein Oramel S. Hough and others were libellants, and the Western Transportation Company were respondents, and was read on the hearing of this cause, is in the words and figures following, to wit:

Interrogatory first. What is your name, age, occupation, and residence?

Answer. My name is George Scott; I am thirty-five years of age; I am a butcher by trade, and occasionally act as night watchman; I reside at Bridgeport, in Cook county.

Interrogatory second. Are you acquainted with the parties to this suit, and how long have you known them; or either of them?

Answer. I knew the plaintiff a year and four months; I know the defendant, by reputation, about six months.

Interrogatory third. State, if you know, whether or not the plaintiffs were last fall, and are now, the owners of any wharf in the south branch of the
86 Chicago river; and if so, how long have they owned and been in possession of the said wharf?

Answer. I do. I don't know how long they have owned and been in possession except so far as I have been with them; during that time they have owned and been in possession of it.

Interrogatory fourth. State where said wharf is situated, and who was in possession and use thereof on the 17th and 18th days of October last.

Answer. The wharf is situated on and in front of lots 4 and 5, in block one of the canal trustees' subdivision of section 29 north, of range fourteen east, on the east bank of the south branch of the Chicago river; the plaintiffs were in possession and use thereof the 17th and 18th days of October last past.

Interrogatory fifth. State whether or not there were any buildings and sheds on or near said wharf on the 17th of October last; if so, describe said buildings, sheds, and the value of the buildings, sheds, and wharfs.

87 Answer. There were sheds and buildings; the buildings consisted of a large stone packing-house, a three-story building, and a brick packing-house two stories high; there was a shed which extended over the whole of the dock, part of which was used as a salt-house, and part for keeping barrels in, and working under it; the shed was built of wood, and one story in height over the dock, and two stories were used for a salt-house; I can't say as to the value of them.

Interrogatory sixth. State what business, if any, was carried on at said premises on the 17th of October last.

Answer. The killing, salting, and packing of beef and pork.

Interrogatory seventh. By whom was the said business carried on?

Answer. By Hough & Co., the plaintiffs in this suit.

88 Interrogatory eighth. State, if you know, how far said packing-houses stood at that time, October 17th, 1856, from the water's edge, and how far said wharf extended along the bank of said river.

Answer. Sixty-feet, I should say, about; I can't say exactly how far the wharf extended along the bank of the river; it extended a long distance.

Interrogatory ninth. State, if you know, whether said plaintiffs had any personal property on said premises on the 17th and 18th days of October last; and if so, state and describe the same.

Answer. They had beef packed and unpacked, salt in barrels and in buckets, empty barrels, carts for beef, cleavers, knives, saws, trucks, scales for weighing, and all the implements, fixtures, and tools usually kept and used in a large beef and pork packing establishment. There was a large quantity of beef in barrels, and salt in barrels, also empty barrels, on said premises at that time, but I am unable to state the amount.

89 Interrogatory tenth. State whether or not said plaintiffs at that time held any beef and pork as bailees for other persons; if so, state if you know the quantity they held upon said premises for others.

Answer. They did, I know; they held a large quantity of beef for Hawkins & Co., some of which was packed and some unpacked; there was five hundred barrels of pork also held by them for others, which was deposited in the cellar of the stone packing-house; they may have held beef and pork for other parties, but of that I do not know.

Interrogatory eleventh. State in whose employ you were on the 17th of October last; how long you had been in such employ; and how long you had been acquainted with the said premises.

Answer. I was in the employ of Hough & Co., the plaintiffs in this suit; I have been in their employ a year and four months; I have been acquainted with the premises that length of time, my employment being a night
90 watchman during part of the time before stated on said premises, and the whole of that time I was engaged on the said premises.

Interrogatory twelfth. State how said wharf of said plaintiffs was used by them during the time you was in their employ as above stated, and was it a private or public wharf?

Answer. (The latter part of the interrogatory objected to.) They used it for their own business exclusively; it was a private wharf.

Interrogatory thirteenth. State in what capacity you was employed by the said plaintiffs on the 17th of Oct. last.

Answer. As night-watchman.

Interrogatory fourteenth. State whether or not on the 17th of October last you saw the propeller Falcon, belonging to the said defendant; if so, where did you see her, when, and state all the circumstances under which you saw her at that time.

91 Answer. I did; I saw her alongside of the plaintiffs' wharf; it was about half past eight o'clock of the evening of the 17th of October last; when I first saw her she was dropping down the stream stern foremost, with her fires up and engine working; they came alongside the dock and the steam letting off. I heard the captain or mate give orders to the men to tie up to the wharf. I asked him, the captain or the mate, whether he had any salt for Hough & Co., and he said no. I then asked him if he had anything for Hough & Co.; he said no. I asked him if he was going to take any load from Hough & Co.; he said no; he said he had been taking in beef at Hancock & Cragin's. I told him my orders were from Hough & Co. that no boat or vessel was to be allowed to tie up at that dock unless she had a load to deliver or to take in at that wharf from Hough & Co. I told him he must not tie up there, but he paid no attention to what I said, and the crew tied the boat there. I then took my lamp and went back into the packing-house on my duty. I walked round the packing-house dock and premises all night, frequently passing along the dock and buildings. I saw no one appear on board the
92 propeller after she tied up, as watchman or otherwise. About past two o'clock in the morning of the eighteenth, as I was passing along on my round, I discovered a light flashing up over the end of the packing-house. I ran through the packing-house on to the dock and saw the propeller was on fire—the fire coming up just forward of the smoke-pipe and near to it, about six or seven feet in height of flame and about three feet in diameter. I immediately gave an alarm of fire. I hollered fire three or four times. I ran up on the hog platform and hollered fire four or five times more. I ran down to the boat again hollering fire, and met a man coming off the boat on to the dock. He had an overcoat on his arm and was dragging a leather trunk after him. He inquired of me the way out, and I said to him to stop and help to put out the fire. He then answered, I want to find the way out of this place. I answered that there was no way out except through the packing-house, and I saw no more of him. I ran in the packing-house and got an axe, and when I got back Joseph Morton was standing on the dock. Joseph Morton
93 caught the axe out of my hand, saying, let us chop the ropes, and he cut them off—the ropes that fastened the propeller to the wharf; then we saw from six to eight men in the boat. Then Morton called out to them to come back and assist in putting out the fire, and not to let the man's property burn up. Then we saw from 7 to 8 men ashore on the opposite side of the slough, standing and looking on. The men in the boat would not come back; they made no answer to our call, but kept rowing on to the opposite side of the river. We then called to the men on the opposite side of the slough, but they paid no attention to our calls and gave no answer. We called to the men in the boat, and also to those on the opposite side of the slough, to bring their boat back and fasten a line to the propeller and haul her into the stream so as to save the buildings, but they paid no attention to our calls, but kept rowing right on to the opposite side of the river. The men in the boat at the time we called out to them to come back with their boat and fasten a rope to the propeller, were not more than forty feet distant from us and must have heard us. At the time we called to the men in the boat there was no part of the dock or buildings of Hough & Co. on fire, and the fire then had not made such progress on
94 the propeller but that we could have easily fastened a rope to the stern

of the propeller and hauled her out into the stream, had the men only returned with their yawl-boat at the time we cut the ropes as above stated. Sollett, Brooks, Lathrop and Beetinech came on the dock and we shoved the propeller from the dock as far as we could with our hands, but the wind blowing against us, drove the propeller back against the dock; we then shoved her off with our hands as far as we could, and then with beef-trees shoved her ten feet or more from the dock, but the wind drove her back against the dock. We then commenced to roll the beef, in barrels, off the dock into the river, and also empty barrels. We rolled off over fifty barrels of beef and a large number of empty barrels into the river. We also took beef-hams and barrels out of the packing-house, and worked there on the dock some twenty minutes or more before the fire caught the building and drove us off.

Interrogatory fifteenth. Do you know where Cragin & Co.'s packing-house is situated, where the said propeller Falcon took on part load? If so, state how far the same was from the said plaintiffs'.

95 Answer. I know where Cragen & Co.'s packing-house is; the distance is about half a mile from the plaintiffs' wharf up stream.

Interrogatory sixteenth. Do you recollect what the weather was on the 17th October last as to its being clear or foggy? If so, state.

Answer. It was foggy.

Interrogatory seventeenth. Do you recollect whether or not at that time it was very foggy? and if so, state whether it became foggy very early in the evening.

Answer. It was foggy at four o'clock in the afternoon of the 17th of October.

Interrogatory eighteenth. State whether or not you are acquainted with the south branch of the Chicago river above and south of said plaintiffs' wharf; if so, state the course of said stream, whether straight or winding.

Answer. I am; it is very winding above plaintiffs' wharf, and crooked.

Interrogatory nineteenth. State whether or not there is a slip above the plaintiffs' wharf where said propeller could have easily winded or moored
96 in perfect safety; if so, state, and how far the same was situated above plaintiffs' wharf.

Answer. There is a slip; it is about forty rods above the plaintiffs' wharf, where I know of fifteen propellers winding; it is where all the propellers coming to our packing-house wind, and where propellers can lay with perfect safety.

Interrogatory twentieth. State if you know whether or not there were other places near to the place where said propeller moored that night of the 17th of October, where she could have moored with perfect safety without being near any buildings or endangering any one's property; if so, state the same.

Answer. Yes; there was one place about 300 feet east of the plaintiffs' wharf, where there were spiles to which she could have moored with perfect safety, on the opposite side of the river where there were no buildings; she might also have anchored in the middle of the stream with safety, or have gone down to Murray's dock, about 600 feet east of plaintiffs' wharf, where
97 there were no buildings to be endangered by fire.

Interrogatory twenty-first How long after you discovered the fire on said propeller was it before the plaintiffs' workmen arrived?

Answer. I should say within ten or fifteen minutes.

Interrogatory twenty-second. How long was it after you discovered the fire and gave the alarm before you saw the crew of the propeller?

Answer. I think it was about 20 minutes; I never saw the crew until after Morton came, except one of them that brought the trunk ashore; the first I saw of the crew were those on the opposite side of the slough and those rowing off in the yawl-boats.

Interrogatory twenty-third. How many men belonging to the crew of said propeller did you see standing on the opposite side of the slough and in the said yawl-boat?

Answer. About eight men in the boat and about six or eight, I should think, on the opposite side of the slough.

98 Interrogatory twenty-fourth. State whether or not, after you discovered the crew of said propeller and called to them to come with their yawl-boat and fasten a rope to said propeller and haul her out into the stream, there was ample time to do so before the wharf and buildings caught fire.

Answer. Yes sir, there was plenty of time. When we first called to the boat's crew they were not more than fifteen feet from the propeller, and could easily have turned about and fastened to her and hauled her out in the stream; I should think it was some twenty minutes after this before the wharf and building caught fire.

Interrogatory twenty-fifth. State whether or not there was any difficulty or danger at the time you called to said boat's crew in fastening a rope to said propeller.

Answer. No sir, not any danger, on account of the wind blowing the flames towards the building, leaving the whole starboard side free from flame, and a line could have easily been attached to her bow or stern.

99 Interrogatory twenty-sixth. State whether or not the crew of said propeller could at that time have landed upon the dock, instead of taking to the boat.

Answer. Yes, and a good deal better.

Interrogatory twenty-seventh. State whether or not the libellants' men on the dock at that time had any boat or any means in their possession or reach of fastening a rope to said propeller.

Answer. No, sir; they had no means whatever.

Interrogatory twenty-eighth. State whether or not said propeller was afterwards hauled out into the stream; and if so, how long after, and how was it done?

Answer. She was hauled out into the stream. I can't say how long after the fire was discovered. I should think it might have been an hour and a half or two hours. I don't know how it was done, as I did not see it, being
100 at work on an engine at the opposite side of the building at the time.

Interrogatory twenty-ninth. State if you know whether there had been any fire in any part of said premises on the day or evening of the said 17th day of October.

Answer. No; there was no fire.

Interrogatory thirtieth. State whether or not the wharf and buildings of said libellants caught fire from said propeller; and if so, were they and the property thereon destroyed and consumed by the said fire or not?

Answer. Yes, from the propeller all the property was destroyed except the barrels we threw into the river, and some barrels, empty ones, that we took out of the cellar.

Interrogatory thirty-first. State whether or not there was any property upon the dock or wharf of the said libellants on the said 17th of October last; if so, state the kind of property, and how the same was stored on the said wharf.

101 Answer. There was; there was beef in barrels; it was stored three tier high in said dock, and extended back five or six tiers, and in length something over one hundred feet.

Interrogatory thirty-second. How far from the edge of the wharf where said propeller lay, and the first tier of beef stowed on said wharf?

Answer. About two feet.

In accordance with the stipulation of the parties to the aforementioned cause, attached hereto, the further taking of testimony in this cause is adjourned to Thursday, the 19th of February instant.

February 5th, 1857.

THURSDAY, *February* 19, 1857.

Present: C. B. Hosmer, for libellants; E. R. Hooper, for respondent; Witness: George Scott.

Examination resumed.

Respondents' proctor declines cross-examination of witness Scott.

his
GEORGE × SCOTT.
mark.
JNO. W. MAGILL, *Com'r.*

102 Sworn to before me this 19th day of February, A. D. 1857.

JNO. W. MAGILL,
U. S. Commissioner.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the district court of the United States within and for said northern district of Illinois, do hereby certify the foregoing transcript to be a true and correct copy of the original deposition of George Scott, taken by John W. Magill, commissioner, on the fifth day of March, A. D. 1857, in the libel in admiralty in said court of Oramel S. Hough, Charles J. Kershaw and Charles H. Seaverns, for themselves and for the Chicago Mutual Insurance Company *et. al.*, libellants, against the Western Transportation Company, as the same now appears in my custody.

{ U. S. revenue stamp. }
{ [SEAL.] }
In testimony whereof, I have hereto set my hand and affixed the seal of said court at my office, in Chicago, in said northern district, this 13th day of October, A. D. 1863.

WM. H. BRADLEY, *Clerk.*

Endorsed: Filed Oct. 22, 1863.

WM. H. BRADLEY, *Cl'k.*

103 And afterwards, to wit, on Monday, the 26th day of October, A. D. 1863, in the record of the proceedings of the circuit court aforesaid is the following entry, to wit:

CHARLES H. WALKER, TRACY J. BRONSON,
WILLIAM KELLOGG and GEORGE C. WALKER,
and the Chicago Mutual Insurance Company, } Appeal.
v.
THE WESTERN TRANSPORTATION COMPANY.

104 The court having considered and being now fully advised of the matters herein submitted, pronounces for the respondents and affirms the decree of the district court.

It is thereupon considered and adjudged by the court that the libel be dismissed, and that the respondent do have and recover of the libellants the costs and charges herein, amounting to the sum of ——— dollars and ——— cents, and that execution issue against the libellants and their stipulators therefor, and the libellants pray an appeal to the Supreme Court.

And afterwards, to wit, on the 31st day of October, A. D. 1863, the said libellants and appellants filed in said court their appeal and appeal bond, which read in the words and figures following, to wit:

CHARLES H. WALKER, TRACY J. BRONSON,
WILLIAM KELLOGG and GEO. C. WALKER,
libellants and appellants,
v.
THE WESTERN TRANSPORTATION COMPANY,
respondent and appellee.
} Appeal.

105 U. S. circuit court, nor. dis. Illinois.

To the honorable the Supreme Court of the United States:

The appeal of the Chicago Mutual Insurance Company, libellant and appellant, who was, by order of the honorable circuit court subrogated, to the rights of the libellants, Charles H. Walker, Tracy J. Bronson, William Kellogg, and George C. Walker, and admitted as the *dominus lifus* in said cause against the Western Transportation Company, respondent, respectfully showeth, that on the twenty-third day of July, A. D. 1857, the above-named Charles H. Walker, Tracy J. Bronson, William Kellogg, and Geo. C. Walker filed their libel in the district court of the United States for the northern district of Illinois against the Western Transportation Company, in a cause of civil and maritime, for the recovery of damages alleged to have been sustained by them by reason of the breach of a certain contract of affreightment, and that the said Western Transportation Company was cited by a monition issued upon said libel to appear and answer, under oath, all and singular the matters articulately propounded in said libel, 106 and said Western Transportation Company having appeared by their proctor, and filed their answer to said libel, and the said libellants having replied thereto, and such proceedings were had in the said cause that on the twenty-first day of July, 1860, a final decree was made and pronounced therein by the said district court, wherein it was in substance adjudged that the libel be dismissed, and that the said respondents recover against libellants their proper costs taxed in the suit; and that after such final decree, said libellants duly appealed therefrom to the circuit court of the United States for the northern district of Illinois, and the said cause was removed thereby into the said circuit court, and then tried anew; and such proceedings were afterwards had in the said circuit court, that afterwards, on the twenty-sixth day of October, A. D. 1863, the said circuit court made a final decree in the said cause, whereby it was decreed that the said decree in the said district court be in all things affirmed with costs, and that the said appellee have 107 execution, and that the stipulators cause their stipulations to be fulfilled, which said decree of the said circuit court is, as this appellant is advised, erroneous and ought to be reversed. Wherefore this appellant appeals from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the said decree of the said circuit court, and the libel, answer, pleadings, depositions, evidence, and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that this time said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made that said libellants receive against the respondent their full damages, together with interest and costs, or such other decree as to the said Supreme Court shall seem just.

GEO. STEEL.
R. RAE, *Proctor.*
A. W. ARRINGTON, *Advocate.*

108 Endorsed: Filed Oct. 31, 1863.

WM. H. BRADLEY, *Cl'k.*

Appeal bond.

Circuit court of the U. S. of America, northern district of Illinois.

CHARLES H. WALKER, TRACY J. BRONSON, WILLIAM KELLOGG, AND and GEO. C. WALKER
v.
THE WESTERN TRANSPORTATION COMPANY.

Know all men by these present, that we, the Chicago Mutual Insurance Company, of the State of Illinois, and Robert Rae, are held and firmly bound unto the above-named Western Transportation Company, a corporation existing by virtue of the laws of the State of New York, in the sum of five hundred dollars to be paid to the said appellee, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the 31st day of Oct., A. D. 1863.

109 Whereas the above-named appellant has presented an appeal to the Supreme Court of the United States at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above suit by the circuit court of the United States for the northern district of Illinois: Now, therefore, the condition of this obligation is such, that if the above appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GEO. STEEL, *P'r.* [SEAL.]
ROBT. RAE. [SEAL.]

Sealed and delivered, and taken and acknowledged, this 31st day of October, A. D. 1863, before me.

[SEAL.]
SAM. T. ATWATER,
Notary Public, city of Chicago.

{ U. S. Revenue Stamp. }

U. S. A,
N. Dis. of Ill., ss:

George Steel and Robert Rae, being duly sworn, depose and say, and each for himself saith that he is worth the sum of five hundred dollars over

110 and above all their just debts and liabilities.

GEO. STEEL.
R. RAE.

Sworn and subscribed before me this 31st day of October, A. D. 1863.

[L. S.]
SAM. T. ATWATER,
Notary Public, city of Chicago.

{ U. S. Revenue Stamp. }

Endorsed: Filed Oct. 31, 1863.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 2d day of November, A. D. 1863, a citation issued herein was filed in the office of the clerk of said circuit court, and reads as follows, to wit:

Citation.

By the honorable Thomas Drummond, judge of the district court of the United States for the northern district of Illinois, in the eighth circuit.

To the Western Trans. Company:

Whereas Charles H. Walker *et al.*, libellants, have lately appealed to the Supreme Court of the United States from a decree lately rendered in 111 the circuit court of the United States for the northern district of Illinois, in the eighth circuit, made in favor of you, the said Western Trans. Company, against them, and have filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday in December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Chicago, in the northern district of Illinois, in the eighth circuit, the thirty-first day of October, in the year of our Lord 1863, and of the independence of the United States the eighty-eighth.

THOMAS DRUMMOND.

U. S. CIRCUIT COURT,
Nor. Dis. Ill., eighth circuit, ss:

Served a copy of the within on Messrs. Bates and Towslee, this second day of November, 1863.

ORRIN SMITH, JR.

Endorsed: Filed Nov. 2d, 1863.

WM. H. BRADLEY, *Cl'k.*

112 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, do hereby certify the above and foregoing to be a full, true, and perfect record of the proceeding and judgment had in the cause, wherein Charles H. Walker and others were the libellants, and the Western Transportation Company were respondents in said court, as the same appears from the records thereof now remaining in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in the city of Chicago, in said district, this 14th day of Nov., A. D. 1863, and of our independence the 88th year.

[SEAL.] WILLIAM H. BRADLEY, *Clerk.*

{ U. S. Revenue
Stamp. }

SUPREME COURT
OF THE UNITED STATES.

◆◆◆

CHARLES H. WALKER,
TRACY J. BRONSON, ET AL.,
vs.
THE WESTERN TRANSPORTATION COMPANY.

◆◆◆

BRIEF ON THE PART OF THE LIBELANTS AND APPELLANTS,
BY
ROBERT RAE.

Act of Cong. applies only to vessels properly
enrolled & licensed.

SUPREME COURT

OF THE UNITED STATES.

CHARLES H. WALKER,
TRACY J. BRONSON, ET AL.
v.
THE WESTERN TRANSPORTATION COMPANY.

Brief on the part of the Libelants and Appellants.

ROBERT RAE, for Appellants and Libelants.

This is a suit in Admiralty in personam. The Libelants complain that on the 17th of October, 1856, at the port of Chicago, they delivered to the Respondents, as common carriers, Six Thousand and Fourteen bushels and 28 pounds of wheat of the value of $7000, to be transported on the Propeller Falcon, whereof the Respondents were the owners, to the port of Buffalo, and that whilst said wheat was on board of said Propeller and in the custody and control of her crew, was wholly lost.

The cause or manner of the loss is not mentioned in the libel, and the Respondents are called upon to account for the non-delivery of the property.

The answer is sworn to, and admits the several allegations in the libel, except as to the ownership and value of the wheat which is alone traversed. The fourth article says—

"That said property was shipped on board said Propeller in the manner and under the circumstances and subject to the terms and conditions hereinafter set forth and none other."

The Eighth article of the answer sets up that the Respondents were, as owners of the Falcon, common carriers, and that said Propeller was at the time when said loss occurred engaged in the "freight and passenger" business, and that they received the property as common carriers.

That said property was, whilst on board said Propeller, wholly lost by *fire*, which happened to be aboard said Propeller, and by means of such fire and not otherwise the Propeller and Respondents were prevented from delivering said property.

The Eleventh article sets up a special contract which was that said "Respondents were not to be made liable to respond for injuries or damage to the property so shipped, caused by fire, unless the said fire should have been caused by the negligence or misconduct of the owners thereof, his or their servants or agents." An amendment to the libel under the rule is made admitting this contract, and under the rule the balance of the answer is to be taken as denied, (see Ad. Rule LII.) under this form of the pleadings, the evidence on both sides was taken.

POINTS.

I. Common carriers by water, like common carriers by land, in the absence of any legislative provisions presenting a different rule, are also in general insurers, and liable in all events, and for every loss or damage, however occasioned, unless it happened by the act of God, or the public enemy, or some other cause or accident without any fault or negligence on the part of the carrier, and expressly excepted in the Bill of Lading.

II. In case of loss or damage to goods in the custody of a common carrier for transportation, the presumption of law is, that it was occasioned by the act or default of the carrier; the burden of proof is for him to show that it arose from an excepted cause and for which he is not responsible.

Nelson et al. vs. *Woodruff*, 1 Black 169.
Dupont de Nemours vs. *Vance*, 19th How. 166.

III. If in the attempt to show that the loss arose from an excepted cause and for which the carrier is not responsible, he shows the loss occurred through the carrier's want of care and foresight, then he fails to show that it was a loss by an excepted cause.

Cordie vs. *Propeller Niagara*, 21 How.
Clark vs. *Barnwell*, 12 How.
Rich vs *Lambert*, 12 How.

IV. A carrier's first duty, and one that is implied by law, when he is engaged in transporting goods by water, is to provide a sea-worthy vessel, tight and staunch and well furnished with suitable tackle, sails or motive power, and furniture necessary for the voyage, and a skillful crew.

Prop. Niagara, 21 How. 23

a. That the non-compliance with the provisions of the statutes in such cases made and provided and the law, is culpable and draws the burden of proof on the owners to show that it did not contribute to the loss.

Waring vs. *Clark*, 5 How. 413.
N. J. S. N. Co. 6 How. 421.

V. Duties remain to be performed by the owner or the master as the agent of the owner, after the vessel is wrecked or disabled. He is still bound by the original obligations to take all possible care of the goods, and is responsible for every loss or injury which might have been prevented by human foresight skill, and prudence.

Prop. Niagara, 21 How.
King vs. *Shepperd*, 3 S.C.C. 258
Elliot vs. *Russell*, 10 Johns, 7.

VI. It is the duty of the master to adopt every reasonable and practicable method to take care of the property during the inpendency of a peril, and the peril imposing such a duty upon him, will not be regarded as the proximate cause of the alleged damage if delinquency is established in this regard.

VII. After the carrier has shown the presence of the peril for which he is not responsible, he is bound to show that no human diligence, skill or care could save the property from being sacrificed by such peril.

VIII. Restrictions upon the common law liability of a common carrier are to be construed most strongly against the common carrier.

IX. Fire being one of the losses presumed by the common law to arise from negligence, the Court will require when this is an exception inserted in a Bill of Lading, to be strictly proven.

This negligence is to be presumed "incendium sine culpa fieri non potest." Targa says, "that a vessel taking fire is not an accident presumed to proceed from an inevitable accident, but that it is attributed to the fault of some one, whenever it is not known how it has happened. Quando non consti dell' origine si attributsce a qualcha colpa." (Targa, ch. 65.) Domat tells us, "Fire almost never happens without some fault, at least that of imprudence or negligence; and those through whose fault, let it be never so slight, a fire has happened, will be answerable for all the damages it does." (1 Domat, p. 619, sec. 1591.) Mr. Justice Johnson, in the case of Patapsco Insurance Company, (3 P. 236,) observes, "From the peculiar character of this risk (fire) it is no easy matter to point out an accident that may not be resolved into negligence. If by the falling of a candle, it may have been because due care was not bestowed upon securing it; and if from a spark from the caboose, it may have been from neglect in not closing or constructing it; and if from a flue or stove, the same reason may be assigned." Again, the United States Supreme Court, in speaking of holding the carrier for loss by fire, says, "The long acquiescence may have had its origin in a general mercantile understanding, or perhaps in the doctrine of Malynes, whose book unites the recommendations of antiquity, good sense and practical knowledge. 'If the master,' says this author, 'be a careful man, the danger of fire above mentioned will be the less for the ship; boys must be looked unto every night and day—for it has often-times happened that by a candle, unadvisedly used by the boys or otherwise, before the ships were unladen, they have been set on fire and burned to the very keel., with all the goods in them.' " This rule of presumption, in case of vessels on fire, is fully recognized and adopted by the United States Supreme Court. (*The New Jersey Steam Nav. Co.* vs. *Mer. Bank,* 1848 6 How. 423; 19 How. 312.) And by the Supreme Court of some of the several States. (6 Martin, 681, 2 Richardson, S. C. 307, ib. 286; 1 Strob. 203, 218.)

In an excellent work recently published by M. Louis Pouget, "Principes De Droit Maratime," Vol 1, p. 96, he says ;—

"D'apres l'avis de quelques autres au contraire, on distingue entre les faits que l'on appelle interieurs et ceux qui ont recu le nom de faits exterieurs ; as derniers sont la tempete, l' abordage sans faute, l' echouement, etc."

According to the views of others on the contrary, we make a distinction between cases which are called interior cases and those which have received the name of *exterior* facts, the latter are the storms, the running foul, the stranding, &c. Again, he says in this connection : "Generalement dans ce cas, le sinistre est repute fatal, le rapport du capitaine fait foi juisqu'a preuve contraire; mais s'il s' aget d'un fait interieur, la presomption du vice propre, l' indendie, par example, l' everement prend un autre caractere,le captaine doit prouver que le sinistre est independant de lui. En matiere d' incendie sur mer, on a compris que le capitaine etait tellement maitre de l' existence du navire qu'il devait etre astreint a demontrer la cause du feu, afin que l'absence de faute put etredemontree."

Generally in this case the accident is considered fatal, the report of the captain is believed until the contrary is proven; but when an interior act is under consideration, the presumption of a proper vice, for instance fire, the event takes a different character, the captain has to prove that the accident happened independent of him. In the case of fire upon the sea, it is understood that the captain is so much master of the vessel's situation that he ought to be compelled to demonstrate the cause of the fire, or at least show absence of any fault.*

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* In a note (2) to Pugot, Vol. I. p. 97, the following interesting arret is mentioned, and, as it has an important bearing on this case, I have given a translation:

"Aix, *December*, 1821.

"Considering that the insurance contract is mutually binding, and produces reciprocal obligations; that the insurer binds himself towards the insured to indemnify him for the fortune of the seas, taking thus the danger upon himself, charging himself with the accident (and the shipper does the same), that he has to find the most extended and the most positive guarantees, he must also be able to ascertain whether such accident is not a fraudulent one, or the consequence of fault. To that end, every captain is bound to expose in his report all the remarkable circumstances of his voyage, the hazards which he has run, the disorders which have happened to his vessel (*Code de Comm.* 242). That this duty is prescribed to him, not only in the interest of navigation, but also in regard to his responsibility, which is even applicable to smaller faults, and does not cease until the obstacles of a higher power have been proven (*Code de Comm.* 221-230). That the consequence of this obligation is to expose, also, facts which, in his opinion, might have produced the accident through a higher power, as the proof of the contrary facts is reserved to the parties themselves (*Code de Comm.* 247). That these details especially have to be observed when the accident is caused by fire which consumes a vessel upon the seas, may originate either from heaven or from the enemy, or some intercourse, or by fault of the thing itself, and that under such alternative the uncertainty has to be cleared up. That Emeregon also, whose doctrine upon insurance is of such great weight, has decided (Vol. 1. p. 443), that when the crew or part of the crew of the burnt vessel save themselves, they are obliged to expose to

The Ordonnance of Louis XIV provides that "if the people, or part of the people, of the vessel burnt

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their consuls the cause of the fire, and the expression of *exposing* does not present only the idea of announcing an accident, but embraces also the articulation of the facts and probabilities, and since there is no effect without a cause, it can always be assigned to such a one reality, or by means of calculations and indications conjectures can be established; indeed, it would be too dangerous to admit that a captain of a vessel should have fulfilled his duty and avoid responsibility by saying only that fire had consumed his vessel, without exposing any circumstance nor probable cause of the origin of such an event, for, by creating himself a title of liberation, it is at least necessary that the captain should expose the accident in a manner which would leave no doubt that an *accident* had happened, and that justice also could recognize it. Considering that the report of Captain Macedo, verified by his crew, who constitute only the few upon the ship and cargo, that when he was questioned about the cause, he answered that 'He did not know. He even could not understand it. That the hold of the ship was closed in all its parts, the hatchways well fastened and covered with prelate;' that this absolute ignorance of the cause of the fire, being neither in the principle nor in the nature of the things, offers already an unfavorable prejudice. That Macedo not being able to state that the fire came from above, nor from an enemy, nor being the fault of a passenger, as he had none, having not even any extraordinary fact, neither in the passage nor in the moment of the conflagration, and the nature of his cargo being such as not to ignite by its own friction, it remains but the probability of his own fault, for not having watched on his vessel against the accidents which are liable to occur where fire is used. He has not even expressed the fact, that on the evening, after the crew went to their rest, he had not made the route, which the head of a family ought to make. It was a sailor lying at the prow who discovered the fire, while he (the captain), watching with his mate upon the deck, was not aware of it. Moreover, he has confessed that he had sent, during the night, spirituous liquors to the caboose by his mate. Then, again, in a particular report to the consul of his nation, he has suppressed this circumstance. It is not by telling that the fire appeared to him to have its seat at the bottom of the hold, in the centre of the vessel, notwithstanding that the hatchways were well closed and covered with prelats, that the captain has made a sufficient declaration, for under the circumstances it is necessary to point out the primitive cause of the fire, and not the place where it has spread, that this state of the Consulate, it cannot be found satisfactory, neither in the eyes of the law nor of reason, and therefore cannot form a title for the insured.

are saved, they are to make their protest before the consul, *and show the cause of the fire*, but if no one survives, the accident will be presumed inevitable."—This is made so because of the inability to produce evidence, and, secondly, because it may have been by lightning, which is a sea peril, and when an accident can as well be attributed to a peril of the sea as to a human fault, the law presumes it to have occurred through a peril of the sea. (9 Car. and Payne, 380; Clark vs. Barnwell, 12 How. 280.)

This presumption of negligence is strengthened from the locality where the fire originated. The fire took place around the boiler, The statute requires that "no combustible material, liable to take fire from heated iron, or any other heat generated on board of such vessels (steam vessels) in and about the boilers, pipes or machinery, shall be placed at less than

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Considering that in the absence of all circumstances which would serve to indicate a true accident on the sea, the insurers are not responsible for the insured property, as they have not taken charge of the baratry of their patron, and such a clause does not exist in their insurance policy. If the Article 350 of the *Code of Commerce*, according to a general understanding, places the fire among the number of risks, this Article means only such fire as happens by accident upon the sea, and as it is understood in the doctrines of Locre and Pardessus, and not fire which might have been caused through the fault or imprudence of the crew. The fire is thus a fatal accident or it is not, according to the cause of its origin or the circumstances which were exposed in the report of the captain. Considering further, that in consulting legislation about risks of bottomry, which are the same as the contract of insurance, it can be seen from the Article 3254 of the *Code of Commerce*, that it is not sufficient to loose the effect entirely which insurance has been taken, to protect the carrier, but it is also necessary that the loss happens through accident. This accidental case must be proven by the person who alleges it, or the report of the captain must furnish such details and circumstances which can produce certainty or the conviction that no personal fault has caused the accident."

eighteen inches from such heated metal or other substance likely to cause ignition, unless a column of air or water intervenes between such heated surface and any wood or other combustible material so exposed, *sufficient at all times* and under all circumstances to prevent ignition." [Act 30, Aug. 1862, sec 2 ; 10 Stat. 61 ; Brightly Dig. p. 849.]

In the case at bar the provisions of this statute were disregarded, and were not sufficient under the most ordinary circumstances to prevent ignition. The fire, then, originated from a violation of law and in disobedience to the commands of the statute.

The case also comes within the spirit of the act of July, 1838, providing against injuries to property from the escape of steam, etc., and making such fact *prima facie* evidence sufficient to charge the defendant or those in his employment, with negligence, until he can show that no negligence was committed by him or those in his employment.

(See Mr. Justice Woodbury in arguendo, 6 How. 423.)

The respondent claims that the exception from loss by fire, under the statute, and also found in the bill of lading, changes the onus.

Where a loss falls within an exception from liability, and the exception is neither a peril of the sea nor the public enemies, but a loss for which they would be liable but for such exception, upon whom does the burthen of proof lie ? Is it for the plaintiff to show that the loss was occasioned by negligence, or the defendant that it was by the pleaded exception ?

In all cases of loss from perils of the sea, negligence is never presumed. It is sufficient for the defendant to show that the apparent cause was a *vis major*, and it is for the plaintiff to show that it might have been avoided by the exercise of reasonable skill and attention on the part of the person employed in the management of the goods, for then it is not deemed to be in the sense of the law such a loss as will exempt the carrier from liability, but rather a loss occasioned by his negligence and inattention to his duty. (Clark *vs.* Barnwell, 12 How. 280, 2 Cal.)

But where the loss is occasioned by a danger against which in the absence of such special contract the carrier is liable, negligence or no negligence, what is the rule? Upon what principle does the rule stand that the carrier shall be insurer, and that the carrier shall not be permitted to show that there was no negligence? Simply because the law, founded on *public policy* and not on the contract, "makes everything negligence in a carrier or hoyman that the law does not excuse." (*Dale* vs. *Hall*, 1 Wils. 281; Chitty on Carriers, pp. 89, 94; 21 Ward, 190; Dougl. 28 to 48.)

As this liability is founded on public policy, and not simply upon the reward to the carrier for the risk he assumes, it follows that contracts limiting this liability are made against public policy, and are to be construed strictly.

Does the limiting the liability also change the presumption of negligence?

Whether the exception be by implication of law or special contract, by common or statute law, or by the bill of lading, the rule of law as to the *onus probandi* would be the same. The contract could only have been that the carrier should be excused if the fire was unavoidable, not if negligent or willful. But he must prove that it was unavoidable. This he and his servants alone can do. It is in his power, and it is his interest to show the fact. Not so with the shipper. The latter would, in all cases, find in the carrier or his servants only witnesses against himself. "To place the *onus* upon him would be to deny him a remedy." 2 Richardson (S. C.) 307. The greater the violation of duty the more certain it is that they would be silent. Would they confess that the vessel was burned through their own negligence, or to enable them to gratify their cupidity? The Court in the case of *Swindler* vs. *Hilliard and Brooks*, 2 Richardson 286, J. EVANS, delivering the opinion, and, in which case, the words "dangers by fire and navigation only excepted," were used in the bill of lading, say, at page 309:

"Upon a full examination of the principles upon "which this case must be decided, I am of opinion "that the proof that the cotton was burnt was not "sufficient for the defendants. They were bound to "show not only that the cotton was destroyed by fire, "but the circumstances under which the destruction "took place, that the jury might judge whether the "accident was unavoidable, or the effect of negligence "or want of care." Which case is approved in *Singleton* vs. *Hilliard and Brooks*, 1 Strobhart, 203-18.

The carrier is still a bailee for reward, and is bound to legal care in the custody of the goods; and to allow him by virtue of his contract to set up the excuse and with it all the presumptions in favor of due care, is to construe his contract to be, that he shall not be liable for a loss presumed to be negligent, unless *aliunde* shown negligent, and that a loss presumed to be negligent shall by virtue of his exemption be presumed inevitable. The goods are within his exclusive control and possession, and he is bound to take such care of them as to be able to explain the cause of their damage or destruction; and not to know this, is to argue himself negligent and uninformed as to the safe custody of his bailment. In such cases ignorance is negligence. As he is bound to know, so ought he to be bound to reveal this knowledge to the bailor, and a refusal or incompetency to do so is *per se* evidence of negligence.

Take an illustration. A carrier agrees with the bailor that he shall not be liable in cases of fire. He also agrees with him that he shall not produce the fire. The presumption is, that if fire does occur that there is negligence on the part of the bailee, and, therefore, he did produce it. The presumption being that he did produce it, until he shows that he did not, he is liable, not for the fire, but for producing it.

The rule is simply this, that negligence in cases of loss by perils of sea is never presumed; that in all other losses negligence is always presumed. That as soon as the defendant shows a peril of the sea, the plaintiff must show negligence. That so soon as the defendant discloses any other accident, he must also show that he did not produce it. That the plaintiff has made proof when he shows the act of which he complains is negligent *per se.* (*Stokes* v. *Saltonstall,* 13 Peters, 181.)

X. The Act of Congress of 1851, limiting shipowners' liability, provides, "That nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of the ship-owner."

Act of 3d March, 1851, 9 Stat. 635.

a. The answer swears that there was a special understanding or contract by which it was understood and agreed that the Respondents were not to be liable "for any injury and damage to the property, " caused by fire unless the said fire should have been " caused by the *negligence of themselves, their servants or* " *agents.*"

This contract is admitted by the libelants and furnishes the Court with the rule of liability.

Rec. pages 5-7.

XI. The Act of Congress, 1851, whilst it limits the owner's liability, does not release the lien upon the vessel, and if the Act of Congress provides the rule and not the special contract, then, as the Respondents have in their possession the salvage, they are still liable to the libelants, if the vessel was liable for the loss.

Sheppard vs. *Taylor*, 5 Peters, 711.

Applying these principles to the case at bar, under the facts,

The Libellants charge negligence upon the Respondents:

a. In the construction of the Propeller.

b. In not submitting her for inspection according to the Acts of Congress and the rules made under them in such cases made and provided.

c. In the equipage of the boat, and the absence of suitable tackle, apparel and furniture as required by the Act of Congress, Aug. 1852. 10 stat. 61.

a. In the construction of the Propeller.

I. In bringing the wood of the hull within eight to twelve inches of the smoke-pipe, without a column of air or water intervening between such smoke-pipe and such wood so exposed, sufficient at all times and under all circumstances to prevent ignition.

II. In building the wood-work of the Propeller through the whole length of the boilers, close up to the outside of the boilers, the same being constructed of metal which is at times heated and likely to cause ignition. In constructing a wooden bulkhead alongside of the boilers on the outside of the two boilers, and against the boilers, and on top of the boilers, running all the way forward to the cross bulkhead and below it to a point about three feet forward of the line of the mouths of the furnaces.

c. In the equipment of the boat and the discipline of the crew.

I. In not having sufficient quantity of buckets rigged with heaving lines.

II. In the storage of the fire engine and hose, one being stored away in one place and the other in another, and both inaccessible in consequence of the fire.

III. In not having any scuttling axes or other instruments for that purpose.

IV. In not having a sufficient watch. In having but one watchman for all night. In having no one to see that the watchman performed his duty.

V. In not having a crew well drilled in the use of the engine, or any disipline adopted to operate as a watch to prevent fires from occuring, or, after breaking out, to extinguish them quickly.

Negligence is charged against the officers and crew of said propeller.

I. For not extinguishing the fire on board said propeller.

II. In not keeping a vigilant lookout against accidental fire.

III. In not using the usual prudence, seamanship, or skill in controlling the fire when discovered.

IV. In not having a skillful and competent crew, under the command of a careful and competent officer.

V. In conducting the discipline of the boat in an unseamanlike and slovenly manner.

ROBERT RAE,

Proctor for Libelants and Appellants.

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16 La Rep. 430

Supreme Court of the United States.

No. 110.—December Term, 1865.

CHARLES H. WALKER, TRACY J. BRONSON, WILLIAM KELLOGG, AND GEORGE C. WALKER, Appellants,

vs.

THE WESTERN TRANSPORTATION COMPANY.

Appeal, in Admiralty, from the Circuit Court of the United States for the Northern District of Illinois.

Brief for Defendant by Mr. SPALDING.

Jos. L. Pearson, printer, 511 Ninth street.

T. Co. asks to intervene under 34th rule.
Can it be permitted? 34th Rule of the
proceedings in rem.

Carles H. Walker et al.
vs.
The Western Transportation Company.

Appeal
In Admiralty.

STATEMENT.

On the 17th day of October, 1856, Walker, Bronson & Co., the libellants, shipped on board the propeller Falcon, then lying in the port of Chicago, six thousand and fourteen bushels and twenty-eight pounds of wheat, (as they alledge,) to be transported and conveyed, on board said propeller, from said port of Chicago to the port of Buffalo, in the state of New York, whither said vessel was bound.

The Western Transportation Company, a corporate body, organized at Buffalo, under the laws of the state of New York, owned the Falcon and several other steam propellers, which they employed in the transportation of merchandise and passengers between Buffalo and Chicago.

After said wheat had been shipped on board of said propeller, but before her cargo had been fully made up and received, she took fire, while lying at the dock in Chicago, and was wholly consumed, with all her cargo then on board, at about half-past two o'clock on the morning of the 18th day of October, 1856. The value of the wheat thus destroyed, is claimed to have been about seven thousand dollars.

On the 9th day of October, 1863, the Chicago Mutual Insurance Company was, by order of the circuit court, subrogated to all the rights of the libellants in this cause.

The libel was filed, July 3d, 1857, in the United States District Court for the Northern District of Illinois against the respondents, as owners of the propeller Falcon, and asks for damages against them for a violation of the contract of affreightment.

The libel was dismissed in the district court July 21st, 1860.—See printed record, page 10.

The cause was appealed by the libellants to the circuit court, where it was heard, and the decree of the district court was affirmed by a dismissal of the libel, October 26th, 1863.—See printed record, page 30.

DEFENCE.

The respondents rely upon the act of Congress entitled "An act to limit the liability of ship-owners, and for other purposes," approved March 3, 1851.

U. S. Statutes at Large, vol. 9, page 635.

This statute, passed for the encouragement of ship-owners, applies as well to vessels navigating the Western Lakes as to those upon the Atlantic ocean.

Moore et al. vs. American Transportation Company, 24 Howard's Reports, 1.

The first section of this act provides that no owner of any ship or vessel shall be liable to answer for any loss or damage which may happen to any goods or merchandise which shall be shipped on board any such ship or vessel, by reason of any fire happening on board the same, *unless such fire is caused by design or neglect of such owner.*

The sixth section saves the remedy of the shipper of the goods against *the master and hands for any negligence* by these persons.

It is insisted that the act of Congress interposes a full and complete defence for the respondents, as the owners of the Falcon, unless they or some of them caused the disaster, either purposely or by neglect.

The master and mariners are directly answerable to the owners of the wheat, if they are justly chargeable with

Act of Congress Mar 3. 51 – S. 6 explain 81
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malversation or neglect in the management and care of the vessel, but their misconduct must not be imputed to the owners unless some *privity* of malfeasance or nonfeasance be established between them.

In marine insurance, the neglect of the master will not release the underwriter from liability to the owner. In Busk vs. The Royal Exchange Assurance Company, 2 Barn. & Alderson, 73, which was an action brought by the owners of a ship on a policy of insurance upon the vessel, it appeared that the ship took fire and was consumed through the negligence of the mate. *Held*, that the owners were, notwithstanding, entitled to recover.

See, also, Austin vs. Drew, 4 Campbell, 360.

Copeland vs. New England Marine Ins. Co., 2 Metcalf, 432.

1 Arnold on Ins., 659.

The defendants insist that the said fire, which destroyed their vessel and the libellants' property on board of the same, was caused by inevitable accident, and did not originate from the neglect, fault, or misconduct of the owners, nor yet of the master and crew of the propeller.

The *onus* of proving blame upon the vessel is cast upon the libellants.

The "Bolina," 3 Notes of Cases, 208.

The testimony, it is respectfully submitted, fully exhonerates from blame all parties connected with the ownership or management of the propeller Falcon at the time she was destroyed by fire, in October, 1856.

R. P. SPALDING,
For Respondents.

McLaughlin on Merch. Shipping 109
c. 26 Geo 3

Davies Rep. 172 – Case under act of Maine –
Owners responsible by com. law responsible – alter ~~[illegible]~~ law of Europe – law of Marine limits responsibility to interest in ship & freight – & owners may discharge themselves by surrender of int. in ship & freight.

2 [illegible] Law Reg. 157 – Case under §2 act '51